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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 569

THE UNITED STATES OF AMERICA, PETITIONER

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, J. M. BERNARDIN, TRUSTEE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 5, 1939
CERTIORARI GRANTED JANUARY 8, 1940

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	1	1
Appellant's statements of points relied on	1	1
Appellant's designation of parts of record to be printed	3	3
Appellees' designation of parts of record to be printed	7	6
Record from D. C. U. S., Eastern District of Oklahoma:		
Petition	11	9
Amended answer of United States Fidelity and Guaranty Company	16	13
Reply to answer and supplemental answer	18	16
Reply to amended answer	23	20
Intervening petition of J. M. Bernardin, trustee of the Central Coal and Coke Co. et al	24	21
Exhibit A—Order appointing trustee of Central Coal and Coke Company	26	23
Petition for leave to intervene	28	25
Order granting leave to intervene	29	26
Answer to intervening petition	30	27
Stipulation as to facts	33	29
Exhibits:		
1—Indian Territory Coal Mining Lease No. I	45	40
2—Indian Territory Coal Mining Lease No. II	50	44
1—Form of bond	54	48
Statements of counsel at trial	55	49
A—Special Master's report	56	50
B—Judgment	66	59

Record from D. C. U. S., Eastern District of Oklahoma—Con.	Original	Print
Transcript of proceedings before Special Master	68	61
Plaintiff's witness: Edward P. Smith	69	64
Defendant's witness: Edward P. Smith	72	64
Stipulation relative to claim	89	76
Defendant's Exhibits:		
5—Advertisement of Auction sale of coal and asphalt deposits	89	77
6—Advertisement of auction sale of coal and asphalt deposits	95	82
8-10—Indian Territory Coal Mining Leases (By reference only)	96	83
11—Advertisement of auction sale of coal and asphalt deposits	96	83
Stipulation of facts in lieu of deposition taken at Washington, August 10, 1937	103	89
Plaintiff's request for findings of fact and conclusions of law	105	90
Defendants' request for findings of fact and conclusions of law	111	96
Findings of fact	119	103
Conclusions of law	123	107
Opinion	125	108
Judgment	133	116
Petition for appeal	134	117
Assignment of errors	135	117
Order allowing appeal	137	120
Citation (By reference only)	138	120
Notice of appeal	138	120
Plaintiff's statement of points relied on	139	121
Clerk's certificate [omitted in printing]	141	122
Order of submission	143	123
Opinion, Bratton, J	143	123
Judgment	150	130
Application for extension of time for filing petition for rehearing	150	130
Order extending time for filing petition for rehearing	151	131
Petition for rehearing [omitted in printing]	152	132
Order denying petition for rehearing	153	133
Appellant's motion for stay of mandate	153	133
Order staying mandate	154	134
Clerk's certificate	154	134
Order allowing certiorari	155	135

1 IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 1854

UNITED STATES OF AMERICA, APPELLANT

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, APPELLEES

Statement of points on which the appellant intends to rely on appeal

Filed March 1, 1939

Comes now the Appellant, United States of America, by its undersigned solicitors, and respectfully represents to this Honorable Court that it intends to rely upon the following Statement of Points on appeal:

I

That the United States District Court for the Eastern District of Oklahoma erred in permitting J. M. Bernardin, Trustee of the Central Coal & Coke Company and The Central Coal & Coke Corporation, a corporation, to intervene in said cause.

II

That the United States District Court for the Eastern District of Oklahoma erred in holding that the claims of J. M. Bernardin, Trustee for the Central Coal & Coke Company and The Central Coal & Coke Corporation, a corporation, were available to the United States Fidelity & Guaranty Company as its defense and for the purpose of defeating the claim of the United States against it.

III

That the United States District Court for the Eastern District of Oklahoma erred in entering and rendering its
2 judgment on the 3rd day of September 1938, upon the judgment of the United States District Court for the Western Division of the Western District of Missouri in Cause No. 12287, in that court, and in giving any effect whatever to that judgment, for the reason that said judgment was void for want of jurisdiction of the court to enter and render it.

IV

That the United States District Court for the Eastern District of Oklahoma erred in entering and rendering its judgment on the 3rd day of September 1938, in said cause in favor of the Intervener, J. M. Bernardin, Trustee for the Central Coal & Coke Company and The Central Coal & Coke Corporation, a corporation, upon its claims against the Choctaw and Chickasaw Tribes, for the reason that said court had no jurisdiction nor authority to entertain the claims of the Intervener.

V

That the United States District Court for the Eastern District of Oklahoma erred in not entering judgment in favor of the United States of America for the amount of its claim.

VI

That the United States District Court for the Eastern District of Oklahoma, in said cause, erred in entering and rendering its judgment on the 3rd day of September 1938, that the United States Fidelity & Guaranty Company recover its costs, for the reason that the United States of America is not taxable with costs.

VII

That the United States District Court for the Eastern District of Oklahoma, in said cause, erred in entering and rendering its judgment on the 3rd day of September 1938, against the Choctaw and Chickasaw Tribes with interest from the date of the judgment of the United States District Court for the Western Division of the Western District of Missouri in Cause No. 12287 in that court, for the reason that the Choctaw and Chickasaw Tribes are not liable and cannot be taxed with interest.

Wherefore, the Appellant, United States of America, prays that the judgment rendered by the United States District Court for the Eastern District of Oklahoma on the 3rd day of September 1938 should be by this Court reversed.

Dated this 25th day of February 1939.

CLEON A. SUMMERS,
United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma.
By CHARLES N. CHAMPION,
Assistant United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma.

Acceptance of Service

Comes now Broaddus and Fite, Attorneys of Record for the Appellees, the United States Fidelity & Guaranty Company, a corporation, and J. M. Bernardin, Trustee for the Central Coal & Coke Company and The Central Coal & Coke Corporation, a corporation, and acknowledges service of a copy of the above and foregoing Statement, this 27th day of February 1939.

BROADDUS & FITE,
By BOWER BROADDUS,
Attorneys for Appellees.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Designation by the appellant, United States of America, of the parts of the record on appeal necessary for the consideration of the statement of points on which the appellant intends to rely

Filed March 1, 1939

Comes now the Appellant, United States of America, by its undersigned solicitors, and respectfully designates the following parts of the record on appeal necessary for the consideration of the Statement of Points on which it intends to rely:

1. Petition of the plaintiff, United States of America. (Pages 1 to 5, inclusive, of the Record.)
2. Amended Answer of the defendant, United States Fidelity & Guaranty Company, a Corporation. (Pages 6 to 8, inclusive, of the Record.)
3. Reply of the plaintiff, United States of America, to Answer and Supplemental Answer of the defendant, United States Fidelity & Guaranty Company, a Corporation. (Pages 9 to 13, inclusive, of the Record.)
4. Reply of the plaintiff, United States of America, to the Amended Answer of the defendant, United States Fidelity & Guaranty Company, a Corporation. (Page 14 of the Record.)
5. Intervening Petition of J. M. Bernardin, Trustee of the Central Coal & Coke Company and The Central Coal & Coke Corporation, a Corporation. (Pages 15 to 17, inclusive, of the Record.)
6. Petition of J. M. Bernardin, Trustee of the Central Coal & Coke Company and The Central Coal & Coke Corporation, a Corporation, for leave to intervene. (Pages 19 to 20, inclusive, of the Record.)

7. Order of the United States District Court for the Eastern District of Oklahoma. (Page 21 of the Record.)
8. Answer of the United States of America to the Intervening Petition of J. M. Bernardin, Trustee of the Central Coal & Coke Company and The Central Coal & Coke Corporation, a Corporation. (Pages 22 to 24, inclusive, of the Record.)
9. Stipulation. (Pages 25 to 35, inclusive, of the Record.)
10. Exhibits of the United States of America, Nos. 1 and 11. (Pages 36 to 41, inclusive, of the Record.)
11. Government's Exhibit No. 1, being Form of Bond. (Page 42 of the Record.)
12. Statements of counsel for the plaintiff and the defendant and intervener, made in open court at trial of case. (Page 43 of the Record.)
13. Judgment of the United States District Court for the Western Division of the Western District of Missouri in Cause No. 12287. (Pages 53 and 54, inclusive, of the Record.) (The certificate of the Clerk upon this judgment may be omitted.)
14. Stipulation. (Pages 91 to 92, inclusive, of the Record.)
15. Request of the United States of America for Findings of Fact and Conclusions of Law. (Pages 93 to 100, inclusive, of the Record.)
16. Request of the United States Fidelity & Guaranty Company, a Corporation, and J. M. Barnardin, Trustee of the Central Coal & Coke Company and The Central Coal & Coke Corporation, a Corporation, for Findings of Fact and Conclusions of Law. (Pages 101 to 109, inclusive, of the Record.)
17. Findings of Fact and Conclusions of Law by the United States District Court for the Eastern District of Oklahoma. (Pages 110 to 123, inclusive, of the Record.)

NOTE.—The claim of the Choctaw and Chickasaw Tribes set out in the Findings of Fact and Conclusions of Law at Pages 111 and 112 of the Record, may be omitted, as this claim appears in the Stipulation heretofore designated.

NOTE.—The Answer of the Central Coal & Coke Company, filed in the United States District Court for the Western Division of the Western District of Missouri in Cause No. 12287, set out in the Findings of Fact and Conclusions of Law at Pages 112 to 116, inclusive, of the Record, may be omitted, as this Answer appears in the Stipulation heretofore designated.

NOTE.—The Order of the Honorable Albert L. Reeves, Judge, appointing J. H. Gordon as Special Master, set out in the

Findings of Fact and Conclusions of Law, at Page 117 of the Record, may be omitted, as this Order is set out in the Stipulation heretofore designated.

NOTE.—Judgment of the United States District Court for the Western Division of the Western District of Missouri, dated February 19, 1936, set out in the Findings of Fact and Conclusions of Law at Pages 118 and 119 of the Record, may be omitted, as this Judgment has been heretofore designated.

18. Opinion of the United States District Court for the Eastern District of Oklahoma. (Pages 124 to 133, inclusive, of the Record.)

6 19. Judgment of the United States District Court for the Eastern District of Oklahoma, dated September 3, 1938. (Pages 134 and 135 of the Record.)

20. Petition for Appeal. (Page 136 of the Record.)

21. Assignment of Errors. (Pages 137 to 139, inclusive, of the Record.)

22. Order of the United States District Court for the Eastern District of Oklahoma, allowing Appeal. (Page 140 of the Record.)

23. Citation. (Page 141 of the Record.)

24. Notice of Appeal. (Pages 142 to 143, inclusive, of the Record.)

NOTE.—The Judgment incorporated in the Notice of Appeal may be omitted, as this Judgment has been heretofore designated.

25. Statement of Points Relied on by Appellant. (Pages 151 to 152, inclusive, of the Record.)

26. Clerk's Certificate to Record on Appeal. (Page 156 of the Record.)

Appellant respectfully represents to the Court that the parts of the record designated above are the only material and necessary parts of the record for consideration of this Honorable Court of the Statement of Points relied on by the Appellant.

Dated this 25th day of February 1939.

CLEON A. SUMMERS,
United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma.

CHARLES N. CHAMPION,
Assistant United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma.

Acceptance of Service

Comes now Broaddus and Fite, Attorneys of Record for the Appellees, the United States Fidelity & Guaranty Company, a corporation, and J. M. Bernardin, Trustee for the Central Coal & Coke Company and The Central Coal & Coke Corpora-
7 tion, a corporation, and acknowledges service of a copy of the above and foregoing Designation of the parts of the Record by the Appellant, this 27th day of February 1939.

BROADDUS & FITE,
By BOWER BROADDUS,
Attorneys for Appellees.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Designation by appellees, United States Fidelity and Guaranty Company, a corporation, and Central Coal and Coke Corporation, a corporation, and J. M. Bernardin, Trustee of the Central Coal and Coke Company of the additional parts of record on appeal necessary for consideration of the appeal

Filed March 6, 1939.

Come now the appellees, United States Fidelity and Guaranty Company, a corporation, and Central Coal and Coke Corporation, a corporation, and J. M. Bernardin, Trustee of the Central Coal and Coke Company, and respectfully designate the following portions of the record, in addition to those heretofore requested by the appellant.

I

Show in paragraph three of the amended answer of the United States Fidelity and Guaranty Company the notation shown in the record on page six thereof, which reads as follows:

(Plaintiff in its designation states as follows, to wit: "Do not include the allegations of the defendant's amended answer set out in Paragraph III, beginning at the top of page 2 and ending with the first paragraph on page 7 of the amended answer. Please make notation that they are incorporated in the stipulation hereafter designated.")

("Do not include the judgment of Hon. Albert L. Reeves, Judge of the U. S. District Court for the Western Division of the Western District of Missouri, dated February 19, 1936, which is set out in Paragraph IV of defendant's answer on pages 8 and 9, as this judgment will be incorporated with the stipulation. This

judgment is the same as Exhibit B attached to stipulation, which was filed on Nov. 23, 1937.")

8 (Letter of the Acting Comptroller General of the United States, dated May 11, 1937, Addressed to the Central Coal and Coke Company, which appears in Paragraph V at page 10 of defendant's amended answer is omitted at request of plaintiff.)

II

Show notations on bottom of page 13 of the record which are as follows:

(Exhibit A referred thereto is the judgment of the U. S. District Court for Western Division of Western District of Missouri, entered Feby. 19, 1936, and which is identified as exhibit B to the stipulation of the parties.)

(Exhibit B is the claim of the Supt. of the Five Civilized Tribes in behalf of the Choctaw-Chickasaw Nations, filed in U. S. District Court for Western Division of Western District of Missouri, which is set forth at length in the stipulation of the parties.)

(That Exhibit C attached to said reply is the answer of the Central Coal and Coke Company, which is set out at length in the stipulation of the parties, hereinafter given.)

III

Exhibit A, the same being the order appointing J. M. Bernardin trustee of the Central Coal and Coke Company, a corporation, appearing on page 18 of the record.

IV

Notation appearing in the record on page 15 as part of paragraph II, as follows:

("Do not include the allegations of the intervening petition set out in paragraph III, beginning with the second paragraph on page 2, and ending at the bottom of page 7 of the intervening petition. Please make notation that these allegations are omitted for the reason that the same are incorporated in the stipulation hereafter designated.)

V

Exhibit A attached to the stipulation of the parties, the same being the findings of facts of the special master in the

9 United States District Court for the Western Division of the Western District of Missouri, No. 12287, and appearing at pages 44 to 52, inclusive, of the record.

VI

Record of the proceedings held before Special Master James H. Gordon in the proceeding pending in the United States District Court for the Western Division of the Western District of Missouri No. 12287.

(a) The evidence at said hearing, pages 55 and 74.

(b) Stipulation had at said hearing, pages 73 and 74.

(c) Exhibit 5, pages 75, 76, and 77.

(d) Exhibit 6, page 78, but only that portion thereof indicated on said page by # * * * #, beginning with the figure 30A S2 of S2 of Sec. 32, Twp. 6 N., R. 16 E. and the remainder of said page 78.

(e) Exhibit 5, appearing on page 79 but only that portion thereof beginning with the figure 30B E2 of E2 of Sec. 1, Twp. 5 N., R. 15 E. and enging with the words "behind the crop" and set off with the following marks # * * * #.

(f) Exhibit 8, pages 80, 81, and 82.

(g) Exhibit 10, pages 83, 84, and 85.

(h) Exhibit 11, pages 86, 87, and 88, and that portion of page 89 set off with # * * * #, beginning with the figure 30D S2 of SW4; NE4 of SE4 of Sec. 14, etc. and ending with page 89, and on page 90 beginning at the top of the page with the figure 30E W2 of SW4 of Sec. 15 and to include only that portion set off with the following marks # * * * #.

Appellants respectfully represent to the court that the additional portions of the record designated above are material and necessary for consideration of this Honorable Court on the appeal of this cause.

Dated this 3rd day of March 1939.

BOWER BROADDUS,
JULIUS B. FITE,
Attorneys for Appellees.

10 Acceptance of Service

Comes now Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, and acknowledges service of a copy of the above and foregoing designation of the parts of the record requested by the appellees, this 4th day of March 1939.

CLEON A. SUMMERS,
United States Attorney
for the Eastern District of Oklahoma.
By CHARLES N. CHAMPION,
Assistant United States Attorney.

[File endorsement omitted.]

11 In United States District Court for the Eastern District of Oklahoma

No. 6451. Law

UNITED STATES OF AMERICA, PLAINTIFF

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, DEFENDANT

Petition

Filed Dec. 24, 1935

Comes now the United States of America, by its undersigned solicitors, acting by and under the direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States, in its own behalf and for and on behalf of the members of the Choctaw and Chickasaw Tribes or Nations of Indians, and brings this action against the United States Fidelity & Guaranty Company, a Corporation, doing business in the State of Oklahoma, and for cause of action alleges and states:

I

That pursuant to the provisions of the Act of Congress approved June 28, 1898 (30 Stats. L. 495), and the agreement set out in Section 29 thereof, duly ratified August 24, 1898, and the rules and regulations prescribed by the Secretary of the Interior on May 22, 1900, relative to mining leases of the Choctaw and Chickasaw Nations, on the 16th day of April 1902, Napoleon B. Ainsworth, the duly appointed and acting Trustee of the Choctaw Tribe or Nation of Indians, and Charles D. Carter, the duly appointed and acting Trustee of the Chickasaw Tribe or Nation of Indians, executed tribal coal mining leases, numbered one and two, respectively, to the Kansas & Texas Coal Company, a Corporation, covering the following described lands, to wit:

Lease No. 1: The East half of the East half of Section one (1), Township five (5) North, Range fifteen (15) East,
12 and all of Section six (6), and the North half of the North half of Section seven (7), Township five (5) North, Range sixteen (16) East,

Lease No. 2: The South half of the South half of Section thirty-two (32), Township six (6) North, Range sixteen (16) East, and all of Section five (5) and the North half of the North half of Section eight (8), Township five (5) North, Range sixteen (16) East;

that said leases above described were duly approved by the Secretary of the Interior on the 13th day of June 1902, which said leases were to run for the full term of thirty (30) years from the date of the execution thereof, a certified copy each of the leases above described, numbered one and two respectively, are attached hereto, marked Exhibits "A" and "B," respectively, and made a part hereof;

II

Plaintiff further alleges and states that as a part and parcel of the same transaction hereinabove described, the Kansas & Texas Coal Company, a Corporation, and party of the second part in said leases referred to and described in Paragraph I herein, as principal, and the defendant, the United States Fidelity & Guaranty Company, a Corporation, as surety, executed a bond in the sum of $75,000.00, payable to the plaintiff, United States of America, conditioned upon the said principal faithfully carrying out and observing all of the obligations assumed by it under the terms and conditions of said leases and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases in the Choctaw and Chickasaw Nations, a certified copy of said bond being hereto attached, marked exhibit "C," and made a part hereof;

III

Plaintiff further alleges that, on the 25th day of August 1902, the Kansas & Texas Coal Company, a corporation, duly assigned and transferred to the Central Coal & Coke Company, a Corporation, organized and existing under the laws of the State of Missouri, all the right, title, and interest of the said Kansas & Texas Coal Company, in and to the leases numbered one and two, respectively, referred to and described in Paragraph I herein, which said assignments were duly approved by the Secretary of the Interior on the 8th day of December 1902;

13 That the defendant, United States Fidelity & Guaranty Company, a Corporation, and surety for the Kansas & Texas Coal Company, as aforesaid, duly consented to the assignment and transfer of the said leases by the Kansas & Texas Coal Company, a Corporation, to the Central Coal & Coke Company, a Corporation, as aforesaid, and agreed that said bond should remain in full force and effect in the same manner and to the same effect as if said Central Coal & Coke Company, a Corporation, had been the original principal in said bond;

That, on or about the 20th day of February 1914, the Central Coal & Coke Company, a Corporation, duly assigned and transferred all its right, title, and interest in and to the leases num-

bered one and two, referred to and described in Paragraph I herein, to the Central Coal and Lumber Company, a Corporation, duly organized and existing under and by virtue of the laws of the State of Texas, and which said assignments were duly approved by the Secretary of the Interior on the 14th day of August 1914, respectively;

That the defendant, United States Fidelity & Guaranty Company, a Corporation, duly consented to the assignment and transfer of said leases numbered one and two by the Central Coal & Coke Company, a Corporation, to the Central Coal & Lumber Company, a Corporation, as aforesaid, and agreed that the said bond should remain in full force and effect in the same manner and to the same effect as if said Central Coal & Lumber Company, a Corporation, had been the original assignee and principal in said bond;

That, thereafter, and on the 30th day of September 1922, the Central Coal & Lumber Company, a Corporation, duly assigned and transferred all its right, title, and interest in and to the leases numbered one and two, referred to and described in Paragraph I herein, to the Central Coal & Coke Company, a Corporation, and which said assignments were duly approved by the Secretary of the Interior on the 2nd day of August 1923, respectively;

That the defendant, United States Fidelity & Guaranty Company, a Corporation, duly consented to the assignment and transfer of said leases numbered one and two by the Central Coal & Lumber Company, a Corporation, to the Central Coal & Coke
14 Company, a Corporation, as aforesaid, and agreed that the said bond should remain in full force and effect in the same manner and to the same effect as if the said Central Coal & Coke Company, a Corporation, had been the original assignee in said assignment and the original principal in said bond;

IV

Plaintiff further alleges that said leases numbered one and two, respectively, referred to and described in Paragraph I herein, provided for the payment to the United States Indian Agent, Union Agency, for the use and benefit of the members of the Choctaw and Chickasaw Tribes or Nations of Indians, as royalty on the production of all mines developed and operated under said leases, the sum of eight (8c) cents per ton of 2,000 pounds on mine run or coal as is taken from the mines, including that which is commonly called "slack"; that said leases provided further for the payment to the United States Indian Agent, Union Agency, as advanced royalty, the sum of $100.00 per

annum in advance for the first and second years, $200.00 per annum in advance for the third and fourth years, and $500.00 per annum in advance for the fifth and each succeeding year thereafter during the term of said leases;

That said lease provided further that the production of coal from each of said leases should not *ne* less than the following quantities: 3,000 tons during the first year from the date of the approval of said leases; 4,000 tons for the second year; 7,000 tons for the third year; 8,000 tons for the fourth year, and 15,000 tons for the fifth and each succeeding year thereafter, and it was further provided that said leases should be subject in all respects to the rules and regulations heretofore *o*f that may be hereafter prescribed under the Act of Congress approved June 28, 1898, by the Secretary of the Interior relative to the mineral leases in the Choctaw and Chickasaw Nations, and for the payment to the United States Indian Agent, Union Agency, of any additional rate of royalty that may be required by the Secretary of the Interior during the ferm of said leases;

V

Plaintiff further alleges that there became due and payable under the terms and provisions of said leases, as advanced royalty, the sum of $500.00 under Lease No. 1, due June 13, 1930; as advanced royalty, the sum of $500.00 under Lease No. 1, due June 13, 1931; as advanced royalty, the sum of $500.00 under Lease No. 2, due June 13, 1930; and as advanced royalty, the sum of $500.00 under Lease No. 2, due June 13, 1931, which said amounts the plaintiff alleges the Central Coal & Coke Company, a Corporation, failed and refused to pay after due demand had been made for the payment thereof;

That, pursuant to the rules and regulations as prescribed by the Secretary of the Interior on December 6, 1907, it was provided that upon the failure of the lessees or their assignees to produce coal in quantities of not less than 15,000 tons after the fifth and each succeeding year from the date of the approval of said leases, that there should become due and payable to the United States Indian Agent, Union Agency, as royalty, the sum of eight (8c) cents per ton of 2,000 pounds on the mine run or coal as it is taken from the mines, including that which is commonly called "slack," on the minimum tonnage of 15,000 tons;

That, by reason of the failure of the assignee, Central Coal & Coke Company, a Corporation, to produce in the years 1930 and 1931, 15,000 tons respectively each year, that there became due and payable to the United States Indian Agent, Union Agency, the sum of $700.00 due June 13, 1930, under the terms and provisions

of Lease No. 1, the sum of $700.00 due under Lease No. 1 on June 13, 1931; the sum of $700.00 due under Lease No. 2 on June 13, 1930, and the sum of $700.00 due under Lease No. 2 on June 13, 1931, after allowing all credits, and which said amounts the said Central Coal & Coke Company, a Corporation, has failed and refused to pay after due demand has been made for the payment thereof;

That due demand has been made upon the said Central Coal & Coke Company, a Corporation, and the defendant, United States Fidelity & Guaranty Company, a Corporation, for each and all of said above sums and that the defendants have failed and refused to pay said amounts;

Plaintiff further states that, by reason of the failure of the Central Coal & Coke Company, a Corporation, to pay the royalty on the amounts, as aforesaid, the conditions of said bond referred to and described in Paragraph II herein have been breached, and that there is due and payable to the plaintiff, United States of America, the aforesaid sums, with interest thereon until paid;

16 Wherefore, Plaintiff prays judgment against the defendant, United States Fidelity & Guaranty Company, a Corporation, for the sum of $1,000.00, with interest at the rate of 6% per annum from June 13, 1930; for the sum of $1,000.00 with interest at the rate of 6% per annum from June 13, 1931; for the sum of $1,400.00 with interest at the rate of 6% per annum from June 13, 1930, and for the sum of $1,400.00 with interest at the rate of 6% per annum from June 13, 1931, until paid, in the total sum of $--------, together with all costs herein laid out and expended.

C. A. SUMMERS,
United States Attorney,
CHARLES N. CHAMPION,
Assistant United States Attorney,
Attorneys for Plaintiff.

[File endorsement omitted.]

(Exhibits not included)

Amended answer

Filed Oct. 12, 1937

Comes now the United States Fidelity and Guaranty Company, a corporation, leave having been first had and obtained, and files this amended answer in lieu of the answer and supplemental answer heretofore filed, and alleges and states:

I

That it denies each and every allegation contained in plaintiff's petition.

II

That the cause of action, if any, of the plaintiff is barred by the Statute of Limitations and that the real party in interest is not the United States of America but the Choctaw and Chickasaw Tribes of Indians and the Mining Trustee of the segregated coal lands of the said tribes.

III

That heretofore in the United States District Court for the Western Division of the Western District of Missouri in the Matter of the Central Coal and Coke Company, debtor, principal upon the bond and the lessee referred to in plaintiff's petition, in cause #12287, there was filed a claim for the identical sums and items set forth in plaintiff's petition, and thereupon the said Central Coal and Coke Company filed an answer to the said claim, the material portions of which are as follows:

17

(Plaintiff in its designation states as follows, to-wit: "Do not include the allegations of the defendant's amended answer set out in Paragraph III, beginning at the top of page 2 and ending with the first paragraph on page 7 of the amended answer. Please make notation that they are incorporated in the stipulation hereafter designated.")

("Do not include the judgment of Hon. Albert L. Reeves, Judge of the U. S. District Court for the Western Division of the Western District of Missouri, dated February 19, 1936, which is set out in Paragraph IV of defendant's answer on pages 8 and 9 as his judgment will be incorporated with the stipulation. This judgment is the same as Exhibit B attached to stipulation, which was filed on Nov. 23, 1937.")

(Letter of the Acting Comptroller General of the United States, dated May 11, 1937, addressed to the Central Coal and Coke Company, which appears in Paragraph V, at page 10, of defendant's amended answer is omitted at request of plaintiff.)

That the Central Coal and Coke Company is a corporation, organized and existing under the laws of the State of Missouri, with its principal place of business in Kansas City, Missouri. That the said Central Coal and Coke Company is the principal upon the bond sued upon by the plaintiff and is owner and holder of the claim heretofore set forth; that at the time of filing the

petition herein the said Central Coal and Coke Company was insolvent and had been duly adjudicated an insolvent corporation and a receiver appointed, and that it does not have any assets at this time, or at any time prior hereto, other than the claim or choses in action heretofore set forth.

That the said Central Coal and Coke Company, a corporation, is the principal upon the bond sued on in this action and the sum sought to have been recovered upon leases I and II in plaintiff's petition against the defendant, United States Fidelity and Guaranty Company, is the identical sum sought in the claim filed against the Central Coal and Coke Company in said proceedings above referred to; and that the United States
18 Fidelity and Guaranty Company, under its rights to surety, does hereby adopt the answer heretofore set forth of the said Central Coal and Coke Company and claims the credits fully set out therein the same as though they were restated hereafter.

(Paragraph IV of this amended answer omitted as set out in Designation of Plaintiff.)

V

That heretofore on December 8, 1936, the Central Coal and Coke Company filed with the General Accounting Office of the United States a claim or claims for the payment of the items heretofore set forth in paragraph three of this answer and requested the payment thereof. Thereafter the duly acting Comptroller General of the United States, on the 11th day of May 1937, duly advised the Central Coal and Coke Company, the principal upon the bond sued upon, that the claim was disallowed, and that said letter of advise disallowing the said claim is in words and figures as follows:

(Letter of Comptroller General of the United States omitted from this amended answer as same is set out in the stipulation of the parties, filed Nov. 23, 1937.)

Wherefore, defendants prays that the plaintiff take nothing by its said action; that the decree heretofore entered in the United States District Court for the Western Division of the Western District of Missouri in the Matter of the Central Coal and Coke Company, a corporation, #12287, be decreed as a bar to the maintenance of this action, and for the defendant's costs.

BOWER BROADDUS,
Attorney for Defendant.

[Filed endorsement omitted.]

In United States District Court

Reply of United States of America to the answer and supplemental answer of the defendant

Filed Sept. 12, 1936

Comes now the plaintiff, United States of America, by its undersigned solicitors, in its own behalf and for and on behalf of the members of the Choctaw and Chickasaw Tribes or Nations of Indians, and for its reply to the answer and supplemental answer of the defendant, United States Fidelity & Guaranty Company, a Corporation, alleges and states:

19

I

Plaintiff denies generally and specifically each and every allegation contained in the defendant's answer and supplemental answer filed herein, except as to such portions thereof as are hereinafter specifically admitted.

II

The plaintiff alleges and states that on the 19th day of February 1936, the United States District Court for the Western Division of the Western District of Missouri, in Cause No. 12287, "In the Matter of the Central Coal & Coke Company, a Corporation, Debtor," rendered a purported judgment in said cause in which it was ordered that the claim of the United States of America in behalf of the Choctaw and Chickasaw Tribes be allowed in the amount of $2,000; that the Central Coal & Coke Company be allowed the sum of $11,060.90 on its counterclaim, leaving a balance due the Central Coal & Coke Company on its said counterclaim and set-off in the amount of $9,060.90; a certified copy of said judgment is hereto attached, marked Exhibit "A" and made a part hereof.

Plaintiff further alleges that on the 25th day of June 1931, the Superintendent for the Five Civilized Tribes, in behalf of the Choctaw and Chickasaw Tribes of Indians, duly filed his claim for royalties and rentals, as set out in plaintiff's original petition filed herein, and as sued for in this action, which said claim was filed with the Receiver in Cause No. 4245 Equity, entitled First National Bank of Chicago, Illinois, v. Central Coal & Coke Company, Defendants, J. M. Bernardin, Receiver, pending in the United States Court for the Eastern District of Oklahoma; that the said last above styled proceeding was an ancillary proceeding to the action pending in the United States District Court for the

Western Division of the Western District of Missouri, entitled "In the Matter of the Central Coal & Coke Company, a Corporation, Debtor, No. 12287"; that it was agreed and stipulated that the claim filed by the Superintendent for the Five Civilized Tribes on behalf of the Choctaw and Chickasaw Tribes or Nations of Indians with the Receiver in the case pending in the United States District Court for the Eastern District of Oklahoma should be considered as filed in the case pending in the Western Division of the Western District of Missouri, as aforesaid; a copy of said claim is hereto attached, marked Exhibit "B" and made a part hereof.

That, thereafter, the Central Coal & Coke Company filed in Cause No. 12287, pending in the United States District Court for the Western Division of the Western District of Missouri, its answer to the claim of the United States in behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, in which answer the said Central Coal & Coke Company alleges and sets up a counterclaim and set-off against the United States and prays for judgment against the United States on its said counterclaim and set-off. A copy of said answer is hereto attached, marked Exhibit "C" and made a part hereof.

Plaintiff further alleges that on or about the 2d day of December 1935 the United States District Court for the Western Division of the Western District of Missouri, in Cause No. 12287, In the Matter of the Central Coal & Coke Company, a Corporation, Debtor, made and entered an order referring the claim of the United States, for the use and benefit of the Choctaw and Chickasaw Tribes or Nations of Indians, against the Central Coal & Coke Company, to James H. Gordon, Esquire, of McAlester, Oklahoma, as Special Master, to hear evidence and make his findings of fact and conclusions of law with reference to said claim to the Court.

That, pursuant to the order of the United States District Court for the Western Division of the Western District of Missouri, in Cause No. 12287, last above referred to, on December 16, 1935, the Special Master appointed by the Court heard the evidence in behalf of the claim of the United States and the counterclaim of the Central Coal & Coke Company, at the conclusion of which the claimant, United States of America, in behalf of the Choctaw & Chickasaw Tribes of Indians, and the Central Coal & Coke Company each filed in writing with said Special Master its request for findings of fact and conclusions of law.

That, thereafter, the Special Master, pursuant to the orders of the Court, as aforesaid, made and entered his findings of fact and conclusions of law upon the issues presented in reference to the claim of the United States in behalf of the Choctaw and Chick-

asaw Tribes or Nations of Indians, as aforesaid, in which findings of fact and conclusions of law the said Special Master found that the claim of the United States of America should be allowed in the amount of $2,000, and that the Central Coal & Coke Company should be allowed on its counterclaim the sum of $11,060.90,
21 leaving a balance due the Central Coal & Coke Company of $9,060.90, a copy of said findings of fact and conclusions of law of the Special Master is attached hereto, marked Exhibit "D" and made a part hereof;

That, thereafter, the United States of America, on behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, filed in writing its exceptions to the findings of fact and conclusions of law made and entered by the Special Master, as aforesaid; that, on the 19th day of February 1936, the exceptions to the Special Master's report and findings of fact and conclusions of law came on for hearing before the United States District Court for the Western Division of the Western District of Missouri, and on said date the Court made and entered its purported judgment heretofore referred to, a copy of which is attached hereto as Exhibit "A."

III

Plaintiff, United States of America, alleges and states that the purported judgment made and entered by the United States District Court for the Western Division of the Western District of Missouri, on the 19th day of February 1936, in Cause No. 12287, entitled "In the Matter of the Central Coal & Coke Company, a Corporation, Debtor," as aforesaid, is void, and of no force and effect, insofar as it allowed the counterclaim and set-off of the Central Coal & Coke Company against the United States of America in the amount of $11,060.90, for the reason that said Court was without power and authority, and without jurisdiction to render judgment in favor of the Central Coal & Coke Company upon said counterclaim and set-off against the United States of America.

The plaintiff, United States of America, in behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, denies that it is indebted in any sum whatever to the defendant, United States Fidelity & Guaranty Company, a Corporation, or the Central Coal & Coke Company, and further alleges and states that no claim for a credit has been presented either by the defendant, United States Fidelity & Guaranty Company, a Corporation, or the Central Coal & Coke Company to the general accounting office of the United States of America for its examination, in the manner and form as provided by the laws of the United States applicable thereto;

The plaintiff further alleges and states that in the records and proceedings in the case entitled "In the Matter of the
22 Central Coal and Coke Company, a Corporation, Debtor," Cause No. 12287, befor' the United States District Court for the Western Division of the Western District of Missouri, and in the records and proceedings before the Special Master to whom said case was referred, as aforesaid, the said Central Coal & Coke Company neither plead nor proved by competent evidence that it had presented its claim, if any, to the General Accounting Office of the United States of America for its examination for allowance or disallowance in the manner as provided by the laws of the United States; that, by reason thereof, the United States District Court for the Western Division of the Western District of Missouri was without power and authority and without jurisdiction to make and enter said purported judgment on the proposed counterclaim and set-off in favor of the Central Coal & Coke Company in the sum of $11,060.90, as aforesaid, against the United States of America, and that said judgment in favor of the Central Coal & Coke Company, on its counterclaim and set-off, as aforesaid, is therefore void and of no force and effect.

Wherefore, the plaintiff, United States of America, prays that the defendant in this action take nothing, and that this plaintiff be awarded judgment against the defendant as prayed for in its original petition filed herein. and for all such other relief to which it may be and appear entitled.

C. A. SUMMERS,
United States Attorney.
CHARLES N. CHAMPION,
Assistant United States Attorney.

(Exhibit A referred thereto is the judgment of the U. S. District Court for Western Division of Western District of Missouri, entered Feby. 19, 1936, and which is identified as exhibit B to the stipulation of the parties.)

(Exhibit B is the claim of the Supt. of the Five Civilized Tribes in behalf of the Choctaw-Chickasaw Nations, filed in U. S. District Court for Western Division of Western District of Missouri, which is set forth at length in the stipulation of the parties.)

(That Exhibit C attached to said reply is the answer of the Central Coal and Coke Company, which is set out at length in the stipulation of the parties, hereinafter given.)

[File endorsement omitted.]

23 In United States District Court

Reply of the United States of America to the amended answer of the defendant, United States Fidelity and Guaranty Company, a corporation

Filed Nov. 23, 1937

Comes now the Plaintiff, United States of America, by its undersigned solicitors, in its own behalf and for and on behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, and for its reply to the amended answer of the defendant, United States Fidelity & Guaranty Company, a corporation, alleges and states:

I

Plaintiff denies generally and specifically each and every allegation and averment contained in the defendant's amended answer filed in said cause, except as to such portions thereof as are hereinafter specifically admitted.

II

The plaintiff, United States of America, for its reply to the amended answer of the defendant, United States Fidelity & Guaranty Company, a corporation, re-adopts, re-affirms and re-alleges each and all of the allegations and averments contained in the reply of the United States of America to the answer and supplemental answer of the defendant filed in said cause as fully and completely as if set out at length herein, and the plaintiff reaffirms and realleges each and every allegation and averment contained in its original petition filed in said cause.

Wherefore, plaintiff, United States of America, prays that the defendant, United States Fidelity & Guaranty Company, a corporation, take nothing in said action and that the plaintiff be awarded judgment against the defendant as prayed for in its original petition filed herein and for all such other and further relief to which it may be and appear entitled.

(Signed) CLEON A. SUMMERS,
United States Attorney,
By CHARLES N. CHAMPION,
Assistant United States Attorney.

[File endorsement omitted.]

24 In United States District Court

Intervening petition of J. M. Bernardin, Trustee of the Central Coal and Coke Company, and the Central Coal and Coke Corporation, a corporation

Filed Oct. 27, 1937

Comes now J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, leave having first been had and obtained, allege and state:

I

That J. M. Bernardin is the duly appointed, acting and qualified trustee of the Central Coal and Coke Company, a corporation, duly appointed in the District Court of the United States for the Western Division of the Western District of Missouri in the matter of the Proceeding for corporate re-organization, No. 12287, and that as such trustee he has retained an interest in that certain judgment hereinafter referred to, and a copy of said order appointing J. M. Bernardin trustee of the Central Coal and Coke Company, a corporation, is attached hereto, made a part hereof and marked "Exhibit A."

That the Central Coal and Coke Corporation, a corporation, on the 16th day of April 1936, duly took over the assets, under the Court's order in the said proceeding above identified and numbered, including all choses in action or claims of any nature of the Central Coal and Coke Company, a corporation, and as such is interested in that certain judgment and finding in the proceeding as will appear more fully hereinafter.

II

Said interveners allege and state that the real party in interest in this action is not the United States of America but that the said United States of America is proceeding solely as trustee for the Choctaw and Chickasaw Tribe of Indians and the Mining Trustee of the segregated coal lands of said tribes.

(V of Plaintiff's designation)

("Do not include the allegations of the intervening petition set out in paragraph III, beginning with the second paragraph on page 2, and ending at the bottom of page 7 of the intervening petition. Please make notation that these allegations are omitted

for the reason that the same are incorporated in the stipulation hereafter designated.)

25 That the said Central Coal and Coke Company, a corporation, is the principal upon the bond sued upon in this action and the sum sought to be recovered upon Leases I and II in this action is identical sum sought in the claim filed against the Central and Coke Company, a corporation, in the said proceeding above referred to.

(Paragraph IV set out at pages 8 and 9 of this intervening petition not included as same is set out as exhibit "B" in stipulation of the parties.)

V

That, heretofore, on December 8, 1936, the said J. M. Bernardin, as trustee of the Central Coal and Coke Company, a corporation, filed with the General Accounting Office of the United States a claim, or claims, for payment as heretofore set forth in paragraph three of this intervening petition; that thereafter the duly acting Comptroller General of the United States by a certain letter of advise disallowed the said claim, which letter of advise is in words and figures as follows:

(Letter not set out herein as same appears in the stipulation of the parties under date of August 23, 1937, and filed Nov. 23, 1937.)

VI

That it is apparent from the allegations herein set forth that the said J. M. Bernardin, as trustee of the Central Coal and Coke Company, a corporation, is a necessary party in this action, for it fully appears from the judgment of the United States District Court for the Western Division of the Western District of Missouri, upon the identical claim sued upon in this action, that it was therein determined that the said J. M. Bernardin had a credit of payment upon the claim of the United States in excess, at that time, of the amount of the claim filed; that it further appears that the balance of said claim of the said J. M. Bernardin, as alleged in this said petition, has been set over and transferred unto the successor, upon re-organization, of the Central Coal and Coke Company, a corporation, said successor company being the intervener herein, Central Coal and Coke Corporation, a corporation.

VII

That the said J. M. Bernardin, trustee of the Central Coal and Coke Company, a corporation, and the Central Coal

26 and Coke Corporation, a corporation, do hereby consent

and request that any of the payment, set-off or counter-claim set forth in this intervening petition that may be determined as due these interveners, or as having been paid by said interveners and in which the interveners have any right, title or interest, be for the benefit and credit of the surety upon the bond sued on in plaintiff's petition, the defendant United States Fidelity and Guaranty Company, as though fully assigned to said Company.

That the said Central Coal and Coke Company, a corporation, at all times since the appointment of the said J. M. Bernardin, as trustee, has been an insolvent corporation and unable to pay its creditors when the claims of its respective creditors fell due and that its assets were insufficient during all the said time to pay its total indebtedness.

Wherefore, your petitioners pray that the judgment of the United States District Court for the Western Division of the Western District of Missouri, in the matter of the corporate reorganization of the Central Coal and Coke Company, a corporation, in cause No. 12287, be decreed as a valid and existing judgment, and that the said interveners have a determination of accounts as between the Mining Trustees of the Choctaw and Chickasaw Tribes, the Choctaw and Chickasaw Tribe of Indians, the United States of America, acting as trustee of the said Tribes and Mining Trustees, and J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, and for such other and further relief as the court deems meet and proper.

J. I. HENRY,
BOWER BROADDUS,
Attorneys for Trustee of the Central Coal and Coke Company, a corporation, Central Coal and Coke Corporation, a corporation,
By J. I. HENRY & BOWER BROADDUS.

Exhibit "A" to intervening petition

In the District Court of the United States for the Western Division of the Western District of Missouri

In the Matter of Central Coal and Coke Company, a Corporation, Debtor.

27 In the Proceedings for Corporate Re-Organization, No. 12287. Order Appointing Trustee of Central Coal and Coke Company.

The above entitled proceedings coming on further to be heard at this time for the hearing provided for in the order herein

dated June 16, 1934, and Central Coal and Coke Company, appearing by Clifford Histed and Hogsett, Smith, Murray and Trippe, its attorneys; and the court having heard the evidence and the arguments of counsel and being fully advised in the premises, finds:

(1) That notice of this hearing has been duly given to creditors and stockholders of Central Coal and Coke Company, by mail, and by publication, in the manner directed by said order dated June 16, 1934, and in accordance with Sec. 77-B of the Bankruptcy Act.

(2) That Central Coal and Coke Company is unable to meet its debts as they mature.

(3) That it is for the best interests of all parties interested in the estate of Central Coal and Coke Company that a trustee be appointed of the estate of Central Coal and Coke Company under Sec. 77-B of the Bankruptcy Act, with power to operate the business of Central Coal and Coke Company until the further orders of this court.

Now, therefore, it is ordered, adjudged, and decreed:

(1) That J. M. Bernardin be and he is hereby appointed trustee of the estate of Central Coal and Coke Company, and that as such he give bond to be approved by this Court in the sum of $25,000.00.

(2) That said trustee take any and all steps necessary or proper to obtain from any receiver of the Central Coal and Coke Company in equity proceedings pending on June 16, 1934, possession of any and all property of Central Coal and Coke Company in the possession of any such receiver and to protect and preserve the same, said property to be held by said trustee subject to all lawful mortgages, pledges, and liens; and that said trustee may operate the business of Central Coal and Coke Company until the further orders of this Court; and that, for the purpose of simplifying settlement and accounting with said equity receivers, the trustee may adopt the operations of the respective equity receivers since June 30, 1934, and may take over such operations as of said date.

28 (3) That Massey Holmes is hereby appointed attorney for the trustee in these proceedings.

(4) That this hearing be and it is hereby adjourned to July 11th, 1934, at 9:30 o'clock A. M., for such further action as may be requisite or proper in the premises.

Dated July 6, 1934.

ALBERT L. REEVES,
United States District Judge.

[File endorsement omitted.]

In United States District Court

Petition for leave to intervene

Filed Oct. 12, 1937

Comes now J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, and allege that the said J. M. Bernardin as such Trustee and the Central Coal and Coke Corporation, a corporation, are necessary and proper parties to the issues involved in the above entitled suit; further, that the petition filed by the plaintiff in this action and the reply filed by the United States, both of which pleadings were filed as trustee for and on behalf of the Choctaw and Chickasaw Tribes, or Nation, discloses that the action therein is against the surety of the Central Coal and Coke Company, a corporation, the United States Fidelity and Guaranty Company, by reason of certain coal royalties or rentals due on two certain leases designated in the said pleadings as Lease One and Lease Two; that the said claim on behalf of the Choctaw and Chickasaw Nation was heretofore presented in a court of competent jurisdiction in the matter of the Central Coal and Coke Company, a corporation, Debtor, in cause No. 12287 in the United States District Court for the Western Division of the Western District of Missouri; that the said claim was heard against the Central Coal and Coke Company and Albert L. Reeves, Judge of the said Court, did, on February 19, 1936, enter his certain order and judgment finding that there was nothing due upon the said bond of the Central Coal and Coke Company, a corporation, but, on the contrary, the said Choctaw and Chickasaw Nation had been paid more than the amount claimed, and, that said judgment is a final and conclusive order.

That the pleadings heretofore filed in this cause show that The United States, in behalf of the Choctaw and Chickasaw
29 Nation, is seeking to set aside the force and effect of the said judgment of the said Court without making the Trustee of the Central Coal and Coke Company, a corporation, your petitioner J. M. Bernardin, or the successor of the said Company, the Central Coal and Coke Corporation, a corporation, a party thereto; that the issues involved in the action materially affect the rights of your petitioners; that if your petitioners are allowed to file intervening petition in this cause it will be that presented herewith and attached hereto and marked "Exhibit I." and will set forth substantially the facts as alleged in said exhibit.

Wherefore, Your petitioners pray that they, and each of them, be permitted to file herein their intervening petition on such terms and conditions as the Court may deem proper.

J. I. HENRY,
BOWER BROADDUS,
Attys for Movants.

(Said exhibit is not set forth because it is the same as the intervening petition thereafterwards filed by the said parties, on October 27, 1937.)

[File endorsement omitted.]

In United States District Court

Order granting leave to intervene

Filed Oct. 22, 1937

Now on this 22 day of October 1937, the interveners J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, having filed herein petition for leave to intervene in this cause and having attached thereto intervening petition proposed to be filed, and the court having duly heard the same and being duly advised—

It is ordered and decreed that J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, be and each of them are hereby authorized to file an intervening petition herein, and the plaintiff is required within fifteen (15) days to file an answer thereto, and the defendant United
30 States Fidelity and Guaranty Company to file such pleading as that defendant may desire.

EUGENE RICE,
Judge of the United States District Court for the Eastern District of Oklahoma.

OK as to form, Chas. N. Champion, Asst U. S. Atty, Attorney for Plaintiff.

[File endorsement omitted.]

In United States District Court

Answer of the United States of America to the intervening petition of J. M. Bernardin, Trustee of the Central Coal and Coke Company and the Central Coal and Coke Corporation, a corporation

Filed Nov. 23, 1937

Comes now the plaintiff, United States of America by its undersigned solicitors in its own behalf and for and on behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, and for its answer to the intervening petition of J. M. Barnardin, trustee of the Central Coal and Coke Company and the Central Coal & Coke Corporation, a corporation, alleges and states;

I

The plaintiff denies generally and specifically each and every allegation and averment contained in the intervening petition of J. M. Bernardin, Trustee of the Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, except as to such portions thereof as are hereinafter specifically admitted.

II

The plaintiff, United States of America, demurs to the intervening petition of J. M. Bernardin, trustee of the Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, for the reason that the record in Cause No. 12287 entitled, "In the matter of the Central Coal & Coke Company, a corporation debtor," in the United States District Court for the Western Division of the Western District of Missouri, shows upon its face that said court was without authority and jurisdiction to render judgment dated February 19, 1936, as plead and referred to in the intervener's petition, and by reason thereof, the said judgment is void and of no force and affect insofar as said
31 judgment allows the counterclaim and set-off of the Central Coal & Coke Company against the United States of America in behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, in the sum of $11,060.90.

III

The plaintiff, United States of America further demures to the intervening petition of J. M. Bernardin, trustee of the Central Coal & Coke Company and the Central Coal & Coke Corporation,

a corporation, for the reason that it does not state facts sufficient to constitute a defense to plaintiff's petition.

IV

The plaintiff, United States of America for its further answer, re-adopts, re-affirms, and re-alleges each and all of the allegations and averments contained in its original petition filed in said cause as if set out at length herein, and alleges and states; that the purported judgment made and entered by the United States District Court for the Western Division of the Western District of Missouri, on the 19th day of February, 1936, in Cause No. 12287, entitled "In the Matter of the Central Coal & Coke Company, a corporation, Debtor," as aforesaid, is void, and of no force and effect, insofar as it allowed the counterclaim and set-off of the Central Coal & Coke Company against the United States of America in the amount of $11,060.90, for the reason that said court was without power and authority, and without jurisdiction to render judgment in favor of the Central Coal & Coke Company upon said counterclaim and set-off against the United States of America.

The plaintiff, United States of America, in behalf of the Choctaw and Chickasaw Tribes or Nations of Indians, denies that it is indebted in any sum whatever to the defendant, United States Fidelity & Guaranty Company, a corporation, the Central Coal & Coke Company, or its successor the Central Coal & Coke Corporation, a corporation, and further alleges and states that no claim for a credit has been presented either by the defendant, United States Fidelity & Guaranty Company, a corporation, the Central Coal & Coke Company, or its successor, the Central Coal & Coke Corporation, a corporation, to the general accounting office of the United States of America for its examination, in the manner and form as provided by the laws of the United States applicable thereto.

32 The plaintiff further alleges and states that in the records and proceedings in the case entitled "In the Matter of the Central Coal & Coke Company, a corporation, Debtor" Cause No. 12287, before the United States District Court for the Western Division of the Western District of Missouri, and in the records and proceedings before the Special Master to whom said case was referred, as aforesaid, the said Central Coal & Coke Company neither plead nor proved by competent evidence that it had presented its claim, if any, to the General Accounting office of the United States of America for its examination for allowance or disallowance in the manner as provided by the laws of the United States; that by reason thereof, the United States Dis-

trict Court for the Western Division of the Western District of Missouri was without power and authority and without jurisdiction to make and enter said purported judgment on the proposed counterclaim and set-off in favor of the Central Coal & Coke Company in the sum of $11,060.90, as aforesaid, against the United States of America, and that said judgment in favor of the Central Coal & Coke Company, on its counterclaim and set-off as aforesaid, is therefore void and of no force and effect.

V

That the plaintiff, United States of America for its furthere answer, moves the court to dismiss the intervening petition of J. M. Bernardin, trustee of the Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, for the reasons as hereinabove set out,

Wherefor', plaintiff, United States of America, pray's that the intervening petition of J. M. Barnardin, trustee of the Central Coal & Coke Company, and the Central Coal & Coke Corporation, a corporation, be dismissed, and that the plaintiff have such other and further relief to which it may be and appear entitled in the premises.

CLEON A. SUMMERS,
United States Attorney.
By CHARLES N. CHAMPION,
Assistant United States Attorney.
Attorneys for Plaintiff, United States of America.

[File endorsement omitted.]

33 In United States District Court

Stipulation as to facts

Comes now the United States of America by the Honorable Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and the United States Fidelity and Guaranty Company, a corporation, by its attorney Bower Broaddus, and stipulates to the following facts subject to objections as to relevency, competency, and materiality by either party.

(1) That pursuant to the provisions of an act of Congress the Trustees of the Choctaw and Chickasaw Nations on April 16, 1902, executed two certain coal mining leases to the Kansas and Texas Coal Company, known as Lease No. I and Lease No. II, described as follows:

Lease No. I. The east half of the east half of Section 1, Township 5 North, Range 15 East, and all of Section 6, and the

North Half of the North Half of Section 7, Township 5 North, Range 16 East,

Lease No. II. The south half of the south half of Section 32, Township 6 North, Range 16 East, and all of Section 5 and the north half of the North Half of Section 8, Township 5 North, Range 16 East.

That the said leases were duly approved by the Secretary of the Interior on the 13th day of June 1902 for a term of thirty years from the date of the execution thereof; that Exhibits "A" and "B" attached to the plaintiff's petition are true and correct copies of the said leases.

That as part and parcel of the same transaction the United State Fidelity and Guaranty Company, the defendant herein, as surety executed the bond in the sum of $75,000.00 conditioned as set forth in the copy attached to plaintiff's petition and marked Exhibit "C," and that said copy is a true and correct copy.

That thereafter on August 25, 1902, the lessee Kansas and Texas Coal Company duly assigned and transferred to the Central Coal and Coke Company, a corporation organized and existing under the laws of the State of Missouri, the said leases and which assignments were duly approved by the Secretary of the Interior on December 8, 1902; that the defendant in this action,
34 United States Fidelity and Guaranty Company, a corporation, consented to the said assignment and transfer and agreed that the bond should remain in full force and effect, the same as though the Central Coal and Coke Company, a corporation, was the original principal.

That all the leases referred to in the pleadings of any of the parties in this cause were assigned to the Central Coal and Lumber Company, a corporation, a subsidiary company of the Central Coal and Coke Company with an interlocking Board of Directors, all of said leases being covered by the same bond, and the defendant United States Fidelity and Guaranty Company consented to said assignment and assumed the obligation under the various leases of the assignee. Thereafter they were reassigned by the Central Coal and Lumber Company, a corporation, to the Central Coal and Coke Company, and again the United States Fidelity and Guaranty Company assumed the liability of the new assignee, Central Coal and Coke Company, a corporation, and consented to such assignment. The assignment of the various leases and the reassignment of the said leases to the Central Coal and Coke Company having transpired at a time when it would not affect, in any way, the controversy herein and so that as to each of said leases and the bond it was

the same as though the Central Coal and Coke Company had been the holder of said leases at all times.

That thereafter, on or about June 25, 1931, in the United States District Court for the Eastern District of Oklahoma, in a cause entitled First National Bank of Chicago, Illinois, plaintiff vs. Central Coal and Coke Company, defendant, J. M. Bernardin, receiver, Equity 4245, the Superintendent of the Five Civilized Tribes for and in behalf of the Choctaw and Chickasaw Nations duly filed his claim for the royalties and rentals set forth and sued for in this action, which claim, omitting caption, is in *words* and figures as follows:

In account with the Superintendent for the Five Civilized Tribes for the Choctaw and Chickasaw Nations, in the matter of the payment of delinquent advance royalties on Coal mining leases Nos. 1 and 2, approved by the Secretary of the Interior, on the 13th day of June 1902, covering Lease No. 1, described as E2 of E2 of Sec. 1, Twp. 5 N. R. 15 E.; all of Section 6, and N2 of N2 of Sec. 7, Twp. 5 N. R. 16 E., and Lease No. 2 described as S2 of S2 of Sec. 32, Twp. 6 N. R. 16 E., all of Section 6, and N2 of N2 of Section 8, Twp. 5 N. R. 16 E.,
35 containing 960 acres, more or less, in each lease, located in the coal and asphalt segregated mining area of the Choctaw and Chickasaw Nations, Oklahoma.

MUSKOGEE, OKLAHOMA

Advance royalty on lease No. 1 due June 13, 1930	$500.00
Advance royalty on lease No. 1 due June 13, 1931	500.00
Advance royalty on lease No. 2 due June 13, 1930	500.00
Advance royalty on lease No. 2 due June 13, 1931	500.00
Deficit royalty on lease No. 1 due June 13, 1930	700.00
Deficit royalty on lease No. 1 due June 13, 1931	700.00
Deficit royalty on lease No. 2 due June 13, 1930	700.00
Deficit royalty on lease No. 2 due June 13, 1931	700.00
Total amount due	4,800.00

A. M. LANDMAN,
Superintendent for the Five Civilized Tribes.

STATE OF OKLAHOMA,
County of Muskogee, ss.

A. M. Landman, Superintendent for the Five Civilized Tribes, being duly sworn, on oath says, that the within account against the Receiver, J. M. Bernadin, for the Central Coal & Coke Company amounting to the sum of Forty Eight Hundred Dollars ($4,800.00) is just after allowing all just credits and offsets, and is now due and unpaid.

Subscribed and sworn to before me this 25th day of June 1931. J. E. Tidwell, Notary Public. (Seal) My commission expires August 13, 1934.

That such proceeding was an ancillary proceeding to a like action in the United States District Court for the Western Division of the Western District of Missouri, in the matter of the Central Coal and Coke Company, a corporation, debtor, #12287. It was agreed that the claim so filed in the United States District Court for the Eastern District of Oklahoma should be considered as filed in the said cause and the said agreement was between the United States Attorney for the Eastern District of Oklahoma and the said Receiver of the Central Coal and Coke Company, the same being J. M. Bernardin.

That thereafter the Central Coal and Coke Company duly filed in the said United States District Court for the Western Division of the Western District of Missouri, the cause
36 being #12287, its answer to the claim of the United States for the Choctaw and Chickasaw Tribes, and which answer, omitting the caption, is in words and figures as follows:

Comes now the trustee of the Central Coal and Coke Company J. M. Bernardin, and for answer to the claim of the United States filed June 25, 1931, which claim is made for payment of delinquent advance royalties, in behalf of the Choctaw and Chickasaw Nations, for coal mined on Lease No. 1 covering the E2 of E2 of Sec. 1 Twp. 5 North, Range 15 East, all of Section 6 and the N½ of the N½ Section 7 Township 5 North, Range 16 East and upon Lease No. 2 described as S½ of the S½ Section 32 Township 6 North, Range 16 East, and all of Section 5 and N½ N½ Section 8 Township 5 North, Range 16 East, alleges and states:

I

Denies that there is anything due upon either of said leases but alleges that the terms and covenants as to the payment of advance royalty has been duly performed as to the same.

II

That on the 8th day of December, 1902, the Trustees of the Segregated Coal Land of the Choctaw and Chickasaw Nation, as lessor, duly leased to the Kansas and Texas Coal Company for the purpose of mining coal all the lands heretofore set forth and designated as Lease No. 1, and that thereafter the said lease was duly assigned and said assignment approved by the Department of the Interior on or about the 14th day of August 1914, to the Central Coal and Coke Company.

That under the terms and provisions of said lease after the fifth year the sum of $500.00 per year was to be paid as advance royalty by the lessee, the said sum to be used as a credit upon any coal subsequently mined in the event mining for any year exceeded the advance royalty required to be paid for any subsequent year. That on June 17, 1920, there had accumulated as advance royalty payment as a credit to the said lease, and against which there had been no charge for mining of coal, the sum of $773.52; that on June 17, 1920, the United States
37 of America acting under and by virtue of the Acts of Congress approved February 8, 1918 (Public, #98—65th Congress) duly sold the segregated coal upon the land heretofore identified as being within Lease No. 1, to the Carbon Coal Company, a corporation, and said sale was duly approved on the 28th day of July 1928, and thereafter all royalty for the mining of coal, or advance royalty that might fall due, was not due to the United States of America for and in behalf of the Choctaw and Chickasaw Nations, but all additional sums were due to the purchaser thereof, the Carbon Coal Company; that by reason of the said *slae* and approval the Central Coal and Coke Company could not, in subsequent years, under the terms and provisions of the said lease, and under the terms of the Act of Congress above referred to, secure credit to the amount of $773.52 for coal actually mined, and that coal was mined thereafter in subsequent years in excess of the advance royalty due and upon which the Central Coal and Coke Company could have claimed the credit had it not been for the said sale, and that by reason of the acts of the United States and the Choctaw and Chickasaw Nations the said Choctaw and Chickasaw Nations and the United States acting as their collector under and by virtue of the said power vested in the Secretary of the Interior by acts of Congress, became indebted and is now indebted to the Central Coal and Coke Company to the sum of $773.52.

That said sale to the Carbon Coal Company and the approval of the said sale by the Secretary of the Interior under the said act of Congress heretofore specifically referred to cancelled any or all sums that might thereafter fall due on said lease from the Central Coal and Coke Company.

III

That on the 8th day of December 1902 the Trustee of the segregated coal land of the Choctaw and Chickasaw Nations, as lessor, duly leased to the Kansas and Texas Coal Company for the purpose of mining coal, all the lands heretofore set forth and designated as Lease No. II, that thereafter the said lease was

duly assigned and said assignment approved by the Department of the Interior on or about the 14th day of August 1914, to the Central Coal and Coke Company.

That under the terms and provisions of said lease, after the fifth year the sum of $500.00 per year was to be paid as ad-
38 vance royalty by the lessee, the said sum to be used as a credit upon any coal subsequently mined, in the event mining for any subsequent year exceeded the advance royalty required to be paid for any subsequent year. That on June 17, 1920, there had accumulated as advance royalty payment, as a credit to the said lease and against which there had been no charge for the mining of coal the sum of $773.28. That on June 17th, 1920, the United States of America, acting under and by virtue of the Act of Congress approved February 8, 1918 (Public, #98—65th Congress), duly sold the segregated coal upon the land heretofore identified as being within lease No. II to the Carbon Coal Company, a corporation, and said sale was duly approved on the 28th day of July 1928, and thereafter all royalty for the mining of coal, or advance royalty that might fall due, was not due to the United States of America for and in behalf of the Choctaw and Chickasaw Nations but all additional sums were due to the purchaser thereof, Carbon Coal Company; that by reason of such sale and approval the Central Coal and Coke Company could not, in subsequent years, under the terms and provisions of the said lease and under the terms of the Act of Congress above referred to, secure credit to the amount of $773.28 for coal actually mined, and that coal was mined thereafter in subsequent years in excess of the advance royalty due and upon which the Central Coal and Coke Company could have claimed the credit had it not been for the said sale, and by reason of the acts of the United States and the Choctaw and Chickasaw Nations, the said Choctaw and Chickasaw Nations and the United States acting as their collector under and by virtue of the said powers vested in the Secretary of the Interior by the Act of Congress above referred to, became indebted and is now indebeted to the Central Coal and Coke Company to the sum of $773.28.

That the sale to the Carbon Coal Company and the approval of the said sale by the Secretary of the Interior under the said Act of Congress, heretofore specifically referred to, cancelled any and all sums that might thereafter fall due on said lease from the Central Coal and Coke Company.

IV

That heretofore on April 16, 1902, the Trustees of the Segregated coal land of the Choctaw and Chickasaw Nations,

as lessors, duly leased to the Kansas and Texas Coal Company Lease No. III, said lease being designated 30-D in the Auction held by the United States thereafter held in June 1920, under and pursuant to certain acts of Congress, which will be more specifically referred to hereinafter, which tract is described as follows:

S½ of SW¼; NE¼ of SE¼ of Sec. 14, and SE¼ of Section 15 and E½ of SW¼ of Sec. 15, and NE¼; E½ of NW¼; NE¼ of SE¼ of Sec. 22; W½ of Sec. 23, Twp. 5 No. Range 16 E. Said lease was duly approved December 8, 1902, by the Secretary of the Interior and thereafter on August 14, 1914, duly sold and assigned with the approval of the Secretary of the Interior, to the Central Coal and Coke Company; that said lease was a non-productive lease and was never mined by the Central Coal and Coke Company, or its assignors.

That under and pursuant to the Curtis Act of June 28, 1898, 30 Sts. L. 495, it was provided that the sole amount that could be charged for the failure to mine said leases was the sum of $500.00 per year, after the fifth year the lease was in force and effect and a similar sum for each year thereafter. That notwithstanding the said fact the Secretary of the Interior promulgated certain rules and regulations under date of May 22, 1900, and on December 6, 1907, imposed an additional payment designated as "deficit Royalty" of $700.00 per year for failure to mine; that there was no authority for the promulgation of said rule and thereafter the United States, acting through the Department of the Interior collected deficit royalty from the Central Coal and Coke Company, in excess of the amount authorized by the terms and provisions of the said lease and permissible under the Curtis Act as aforesaid, a total sum of $8,486.54; that there was credited against this payment for coal subsequently mined royalty earned and due, but there is now on hand, of the deficit royalty so paid to the credit of the said property, the sum of $914.10 and that the said amount was illegally collected from the Central Coal and Coke Company by duress and threats of the cancellation of the rights of the Central Coal and Coke Company under the said leases, and that the said plaintiff acting for and in behalf of the Choctaw and Chickasaw Nations, and the said Choctaw and Chickasaw Nations, are indebted to the Central Coal and Coke Company in the sum of $914.10.

V

That the allegations of the preceding paragraph are hereby realleged and made a part of this the Trustee's cross-claim against the claimant United States of America, acting for and in behalf

of the Choctaw and Chickasaw Tribes; that on April 16, 1902, the Trustees of the Choctaw and Chickasaw Nations, as lessors, duly leased to the Kansas and Texas Coal Company certain land designated as Lease No. IV, and thereafter designated in the auction sale duly held by the United States in behalf of the Choctaw and Chickasaw Nations as Tract 30–E which tract is described as follows:

W½ of SW¼ of Section 15, and S½ of NW¼; S½ of Section 16, and S½ of NE¼; SE¼ of Section 17 and N½ of N½ of Section 21, and W½ of NW¼ of Section 22, Township 5 North, Range 16 East.

That said lease was duly approved December 8, 1902; that thereafter said lease was duly assigned to the Central Coal and Coke Company, and the said assignment approved by the Secretary of the Interior on August 14, 1914; that the said lease was a nonproductive lease and one upon which no coal had been mined; that thereafter under and pursuant to the Act of Congress, approved on February 8, 1918 (Public, 98—65th Congress) the said segregated coal land described in both of said tracts were duly sold to the Central Coal and Coke Company and the said sale was duly approved by the Secretary of the Interior, pursuant to the said Act of August 29, 1919; that under and by virtue of Section 4 of the said Act it was provided: "If any lessee becomes the purchaser of any coal deposit on any undeveloped lease owned by him, then one-half advance royalty paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalty heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

That upon lease No. III there was to the credit for advance royalty paid, at the time of the said purchase, the sum of $7,600 and upon Lease No. IV, at the time of the said purchase by the Central Coal and Coke Company, there was to
41 the credit of the said lease for advance royalty paid the sum of $8,036.20; that under and pursuant to the terms and provisions of the said Act of Congress one-half of the respective amounts was applied upon the purchase price of the Central Coal and Coke Company; that the remainder of the said sum had not been credited to the Central Coal and Coke Company on account of any production of coal on any other lease which the Central Coal and Coke Company owned and operated and that by reason thereof the Central Coal and Coke Company is entitled to a credit of the two sums upon any claim of the claimant United States in behalf of the Choctaw and Chickasaw Nations herein.

That as to Lease No. III and No. IV, heretofore referred to, the same were non-productive leases or undeveloped leases within the terms and provisions of the said Section 4th of the Act of Congress approved February 8, 1918. (Public 98–65th Congress.)

VI

That under the terms and provisions of the Curtis Act, approved June 28, 1898, 30 Stats. L. 495, the deficit royalty on Lease No. I, due June 13, 1930 to the amount of $700.00 and upon the same lease due June 13, 1931, to the amount of $700.00, and the deficit royalty on Lease No. II due June 13, 1930, to the amount of $700.00, and upon the same lease due June 13, 1931, to the amount of $700.00, is not and cannot be a charge against the lessees of said leases; that said rules and regulations of the Secretary of the Interior, prescribed after the passage of the said Curtis Act, and the terms and provisions of any leases thereafter made pursuant to the said Act, are void and of no force and effect if they require more than the payment of the advance royalty, not to exceed the sum of $500.00 authorized to be charged under the terms and provisions of the said Curtis Act.

Wherefore, your Trustee prays that the claim of the United States, acting through the Superintendent of the Five Civilized Tribes in and for behalf of the Choctaw and Chickasaw Nation, be denied; that your Trustee recover of the said claimant upon Lease No. I, under the provisions in Count II of this answer from the Choctaw and Chickasaw Nations $773.52; That your Trustee, recover in behalf of the Central Coal and Coke
42 Company, upon Lease No. II, under the provisions in Count III of this answer, in the sum of $773.28 from the Choctaw and Chickasaw Nation; that your trustee recover upon Count IV from the Choctaw and Chickasaw Nations for deficit royalty illegally and wrongfully collected the sum of $914.10; that your Trustee obtain credit upon Count V of this answer, upon Lease III to the sum of $3,800.00 and upon Lease No. IV to the amount of $4,018.10; and for such other and further relief as the Court may deem meet and proper.

BOWER BROADDUS,
Attorney for Trustee.

STATE OF OKLAHOMA,
County of Muskogee, ss.

Bower Broaddus, of lawful age, being first duly sworn, deposes and says that he is attorney for the Trustee in the matter of the claim of the United States in behalf of the Choctaw and

Chickasaw Nation against the Central Coal and Coke Company, J. M. Bernardin, Trustee; that he is familiar with the facts set forth in the foregoing answer of the said Trustee and they are true.

BOWER BROADDUS.

Subscribed and sworn to before me this 17th day of June, 1935. Elizabeth Vogel, Notary Public. My commission expires January 24, 1938.

That said answer was filed on or about June 19, 1935.

That thereafter pursuant to stipulation of the parties in the said cause Honorable Albert L. Reeves, Judge of the said Court, duly entered his order appointing James H. Gordon of McAlester, Oklahoma as Special Master to make his finding of fact and conclusions of Law with reference to said claim of the United States and the answer thereto of the Central Coal and Coke Company, which order, omitting the caption, is in words and figures as follows:

Now on this 2nd day of December 1935, it appearing that the United States for the use and benefit of the Choctaw Chickasaw Nation has, by and with the consent of the Attorney General of the United States, agreed with the Central Coal and Coke Company and J. M. Berna'din, Trustee thereof, that the claim
of the said United States for the Use and Benefit of the
43 Choctaw-Chickasaw Nation may be referred to James H. Gordon, of McAlester, Oklahoma, as special master, said agreement of the parties as to such procedure and for reference to the said James H. Gordon as special master is hereby approved.

It is, therefore, Ordered and Decreed that the claim of the United States for the use and benefit of the Choctaw-Chickasaw Nation against the Central Coal and Coke Company be referred to James H. Gordon, Esquire, of McAlester, Oklahoma, and he is required to hear the evidence, allow such amendments to the claim or answers as he deem fit, require the attendance of necessary witnesses, that evidence be taken and transcribed and reported together with his findings of fact and conclusions of law, and that such findings of fact and conclusions of law be had and filed within ninety days from the date hereof.

ALBERT L. REEVES, *Judge*.

That pursuant to said order the matter was duly heard before the said special master and he made his findings of fact and conclusions of law upon the said issues presented by the said claim and answer and cross-petition in which he found that there was due the Choctaw and Chickasaw Tribes on Lease I

the sum of $1,000.00 for advance royalty, and upon Lease II the sum of $1,000.00 for advance royalty, and that the principal upon such bond, the said Central Coal and Coke Company, had a credit against the said sums, by reason of the cross-petition and cross-action filed as set forth heretofore as follows:

For Advance Royalty accumulated upon Lease One and Lease Two in the sum of	$1,546.80
Upon deficit or minimum tonnage royalty paid under the requirements of the Secretary of the Interior without authority of law, upon Lease Three	$914.10
Upon Lease Three and Four credit for advance royalty accumulated, the sum of	$8,600.00
Total	$11,060.90

This left a balance due the Central Coal and Coke Company from the Choctaw and Chickasaw Tribes in the sum of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90).

44 That thereafter on February 19, 1936, the United States having filed exceptions to the Special Master's report and the same coming on to be heard before the Honorable Albert L. Reeves, Judge of the United States District Court for the Western Division of the Western District of Missouri, and the court having heard argument of counsel and being duly advised approved the findings of fact and conclusions of law and each and every finding and conclusion and adopted the same as the findings of the court, said findings of fact and conclusions of law are attached hereto, made a part hereof, and marked "Exhibit A," and duly entered his judgment thereupon, a certified copy of which judgment is hereto attached, made a part hereof and marked "Exhibit B"; that there has been no appeal from the order so attached and no steps taken for such appeal at the date of this stipulation.

That the evidence taken at said hearing is considered as a part of this stipulation and designated as "Record of Proceedings had in in the grand jury room of the Federal Court in Muskogee, Oklahoma, December 16, 1935, before James H. Gordon, Special Master," together with all exhibits, the same being Government's exhibits 1 and 2, which are also Central Coal and Coke Company's exhibits 1 and 2, and Government's exhibit 3, and the Central Coal and Coke Company's exhibits 3 to 17, inclusive, which are considered herewith as a part of the stipulation.

That thereafter both the United States of America and the Central Coal and Coke Company filed a request for findings of fact and conclusions of law, which are a part of this stipulation; that thereafter the said James H. Gordon, on the 19th day of February 1936, duly made his findings of fact and conclusions of law and that the same are considered a part of this

stipulation; that exceptions were duly filed to the said findings of fact and conclusions of law; that on February 19, 1936, the said Special Master's report was affirmed in all things and the judgment heretofore set forth was duly entered in said cause; that all the said proceedings are to be considered as evidence in this cause.

That as part of this stipulation the stipulation heretofore entered into by and between the plaintiff and the defendant, with reference to the filing of the claim with the General Accounting Office of the United States if considered a part hereof.

45 That the Central Coal and Coke Company is a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in Kansas City, Missouri. That the said Central Coal and Coke Company is the principal upon the bond sued upon by the plaintiff and is owner and holder of the claim heretofore set forth; that at the time of filing the petition herein the said Central Coal and Coke Company was insolvent and had been duly adjudicated an insolvent corporation, and a receiver appointed.

That the parties hereto may offer such additional testimony as either may desire, subject of course to the objections for reason of irrelevency, incompetency, or immateriality.

That this stipulation is binding on Interveners.

CLEON A. SUMMERS,
United States Attorney.
By CHARLES N. CHAMPION,
Asst. U. S. Atty.,
Attorney for Plaintiff.

BOWER BROADDUS,
Attorney for Defendant and Intervenors.

Government Exhibit 1

Received, Union Agency, Aug. 21, 1914----------
No. 50706.

Transferable and negotiable only with the consent of The Secretary of the Interior.

Triplicate

(Write all names and addresses in full)

June 15, 1900

Indian Territory Coal Mining Lease. (Choctaw and Chickasaw Nations)

Indenture of lease, made and entered into in quadruplicate, on this Sixteenth day of April, A. D. 1902, by and between Napoleon

B. Ainsworth and Charles D. Carter as mining trustees of the Choctaw and Chickasaw nations, parties of the first part, and Kansas & Texas Coal Company, a corporation organized
46 and existing under the laws of the State of Missouri, with principal office in _____ of St. Louis, County of City of St. Louis, State of Missouri, party of the second part, under and in pursuance of the provisions of the act of Congress approved June 28, 1898 (30 Stats., 495), the agreement set out in section twenty-nine thereof duly ratified on August 24, 1898, and the rules and regulations prescribed by the Secretary of the Interior on May 22, 1900, relative to mining leases in the Choctaw and Chickasaw nations.

Now, therefore, this indenture witnesseth, That the parties of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the party of the second part, its successors, or assigns, do hereby demise, grant, and let unto the party of the second part, its successors, or assigns, the following described tract of land, lying and being within the Choctaw Nation, and within the Indian Territory, to wit: The E½ of E½ of Section 1, Tp 5 North, Range 15 East; and All of Section 6 and N½ of N½ of Section 7 of township[1] 5 North, of range[2] 16 East, of the Indian Meridian, and containing 960 acres, more or less, for the full term of thirty (30) years from the date hereof for the sole purpose of prospecting for and mining coal. A map of said lease is attached hereto and made a part of this lease for a more definite description of Same.

In consideration of the premises the party of the second part hereby agrees and binds itself, its successors, or assigns, to pay or cause to be paid to the United States Indian agent for the Union Agency, Indian Teritory, as royalty, the sums of money as follows, to wit:

On the production of all mines developed and operated under this lease the sum of Eight (8) cents per ton of 2,000 pounds on mine-run, or coal as it is taken from the mines, including that which is commonly called slack.

And all said royalties accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

And the party of the second part further agrees not to hold the land described for speculative purposes, but in good faith for mining the mineral specified.

47 And the party of the second part further agrees and binds itself, its successors, or assigns to pay or cause to be paid to the United States Indian agent for the Union Agency,

[1] State whether North or South. [2] State whether East or West.

Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this lease the sums of money as follows, to wit: One hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars per annum, in advance, for the fifth and each succeeding year thereafter, of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be a credit on royalty should the party of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty as above set forth; and further, that all advanced royalties as above defined shall apply from date of approval of each lease, and when any mine is operated royalty due shall be paid monthly as required until the total amount paid equals the first annual advanced payment, after which royalty due shall be credited on such payments; and the party of the second part agrees and binds itself, its successors, or assigns to operate and produce coal from each and every lease of not less than the following quantities: Three thousand tons during the first year from date of approval of lease; four thousand tons the second year; seven thousand tons the third year; eight thousand tons the fourth year; and fifteen thousand tons the fifth and each succeeding year thereafter; and it is further agreed that should the party of the second part neglect or refuse to pay such advanced royalty for the period of sixty days after the same becomes due and payable under this lease, then this lease shall be null and void, and all royalties paid in advance shall become the money and property of the Choctaw and Chickasaw tribes of Indians, subject to the regulations of the Secretary of the Interior aforesaid.

The party of the second part further covenants and agrees to exercise diligence in the conduct of the prospecting and mining operations, and to open mines and operate the same in a workmanlike manner to the fullest possible extent on the above-described tract of land; to commit no waste upon said land or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to take good care of the same, and to
48 surrender and return the premises at the expiration of this lease to the parties of the first part in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated, and unavoidable accidents, excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by said Kan-

sas & Texas Coal Company, the party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified—except engines, tools, and machinery, which shall remain the property of the said party of the second part; that it will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away to be used for any purposes on the premises, and that it will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that it will not at any time during the term hereby granted, assign, transfer, or sublet its estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the parties of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said party of the second part further covenants and agrees that it will keep an accurate account of all mining operations, showing the whole amount of coal mined or removed, and that there shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all such coal obtained from the land herein leased, as security for the monthly payment of said royalties.

And the party of the second part agrees that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed, under the said act of June 28, 1898, by the Secretary of the Interior relative to mineral leases in the Choctaw and Chickasaw nations; and said party of the second part expressly agrees to pay to said United States Indian agent any additional rate of royalty that may be required by the Secretary of the Interior during the term this lease shall be in force and effect; and
49 further, that should the party of the second part, its successors, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of thirty days to pay the stipulated monthly royalties provided for herein, then the Secretary of the Interior shall be at liberty, in his discretion, to avoid this indenture of lease, and cause the same to be annulled, when all the rights, franchises, and privileges of the party of the second part, its successors, or assigns hereunder shall cease and end, without further proceedings.

The party of the second part is firmly bound for the faithful compliance with the stipulations of this indenture by and under

the bond made and executed by the party of the second part as principal and the United States Fidelity and Guaranty Co. as surety entered into the Sixteenth day of April 1902, and which is on file in the Indian Office.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above mentioned.

All erasures and interlineations made before signing.

Witnesses:[3]

William H. Ausley Hampton Tucker Both witnesses of McAlester, Isn't	as to both	as to Napoleon B. Ainsworth (Seal) Trustee for Choctaw Nation. as to Charles D. Carter (Seal) Trustee for Chickasaw Nation.
James J. McDonald John G. Etzkorn Both Witnesses of St. Louis, Mo.	as to both	as to Kansas & Texas Coal Company By B. F. Hobart (Seal) President. as to A. S. Cale (Seal) Secretary, pro tem.

Revenue stamps,[4] properly cancelled, to amount of One Dollar, affixed to original copy of this lease.

50 *Government Exhibit 2*

Received, Union Agency, Aug. 21, 1914. ----------

No. 50706.

Transferable and Negotiable only with the consent of The Secretary of the Interior.

Triplicate
(Write all names and addresses in full)
(June 15, 1900)

Indian Territory Coal Mining Lease. (Choctaw and Chickasaw Nations)

Indenture of Lease, made and entered into in quadruplicate, on this Sixteenth day of April, A. D. 1902, by and between Napoleon B. Ainsworth and Charles D. Carter as mining trustees of the Choctaw and Chickasaw nations, parties of the first part, and Kansas & Texas Coal Company, a corporation organized and existing under the laws of the State of Missouri, with

[3] Two witnesses to each signature, including signatures of trustees.

[4] Stamps are required by the act of June 13, 1898, to be placed on leases as follows, viz: Leases for one year, twenty-five cents; for more than one year and not exceeding three years, fifty cents; and for more than three years, one dollar. Lessees must furnish stamps for all leases.

principal office in St. Louis, City of St. Louis, State of Missouri, party of the second part, under and in pursuance of the provisions of the act of Congress approved June 28, 1898 (30 Stats. 495), the agreement set out in section twenty-nine thereof duly ratified on August 24, 1898, and the rules and regulations prescribed by the Secretary of the Interior on May 22, 1900, relative to mining leases in the Choctaw and Chickasaw nations.

Now, therefore, this indenture witnesseth, That the parties of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the party of the second part, its successors, or assigns, do hereby demise, grant, and let unto the party of the second part, its successors, or assigns, the following-described tract of land, lying and being within the Choctaw Nation, and within the Indian Territory, to wit: The S½ of the S½ of Section 32, Tp. 6 North, Range 16 East, and All of Section 5 and N½ of N½ of Section 8, of township [5] 5 North, of range [6] 16 East, of the Indian Meridian, and containing 760 acres, more or less, for the full
51 term of thirty (30) years from the date hereof for the sole purpose of prospecting for and mining coal. A map of said lease is attached hereto and made a part of this lease for a more definite description of Same.

In consideration of the premises the party of the second part hereby agrees and binds itself, its successors, or assigns, to pay or cause to be paid to the United States Indian agent for the Union Agency, Indian Territory, as royalty, the sums of money as follows, to wit:

On the production of all mines developed and operated under this lease the sum of Eight (8) cents per ton of 2,000 pounds on mine-run, or coal as it is taken from the mines, including that which is commonly called "slack."

And all said royalties accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

And the party of the second part further agrees not to hold the land described for speculative purposes, but in good faith for mining the mineral specified.

And the party of the second part further agrees and binds itself, its successors, or assigns to pay or cause to be paid to the United States Indian agent for the Union Agency, Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this lease the sums of money as follows, to wit: One hundred dollars per annum, in

[5] State whether North or South.
[6] State whether East or West.

advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars per annum, in advance, for the fifth and each succeeding year thereafter, of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be a credit on royalty should the party of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty as above set forth; and further, that all advanced royalties as above defined shall apply from date of approval of each lease, and when any mine is operated royalty due shall be paid monthly as required until the total amount paid equals the first annual advanced payment, after which royalty due
52 shall be credited on such payments; and the party of the second part agrees and binds itself, its successors, or assigns to operate and produce coal from each and every lease of not less than the following quantities: Three thousand tons during the first year from date of approval of lease; four thousand tons the second year; seven thousand tons the third year; eight thousand tons the fourth year; and fifteen thousand tons the fifth and each succeeding year thereafter; and it is further agreed that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable under this lease, then this lease shall be null and void, and all royalties paid in advance shall become the money and property of the Choctaw and Chickasaw tribes of Indians, subject to the regulations of the Secretary of the Interior aforesaid.

The party of the second part further convenants and agrees to exercise diligence in the conduct of the prospecting and mining operations, and to open mines and operate the same in a workmanlike manner to the fullest possible extent on the above-described tract of land; to commit no waste upon said land or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to take good care of the same, and to surrender and return the premises at the expiration of this lease to the parties of the first part in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated, and unavoidable accidents, excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by said Kansas & Texas Coal Company, the party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations

herein specified—except engines, tools, and machinery, which shall remain the property of the said party of the second part; that it will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away to be used for any purposes on the premises, and that it will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that it will not at any time during the term hereby granted, assign, transfer, or sublet its estate, interest, or term in said premises and land or the appurtenances thereto to any
53 person or persons whomsoever without the written consent thereto of the parties of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said party of the second part further covenants and agrees that it will keep an accurate account of all mining operations, showing the whole amount of coal mined or removed, and that there shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all such coal obtained from the land herein leased, as security for the monthly payment of said royalties.

And the party of the second part agrees that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed, under the said act of June 28, 1898, by the Secretary of the Interior relative to mineral leases in the Choctaw and Chickasaw nations; and said party of the second part expressly agrees to pay to said United States Indian agent any additional rate of royalty that may be required by the Secretary of the Interior during the term this lease.

[* * * omitted from copy * * *]

executors, administrators, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of thirty days to pay the stipulated monthly royalties provided for herein, then the Secretary of the Interior shall be at liberty, in his discretion, to avoid this indenture of lease, and cause the same to be annulled, when all the rights, franchises, and privileges of the party of the second part, its successors, executors, administrators, or assigns hereunder shall cease and end, without further proceedings.

The party of the second part is firmly bound for the faithful compliance with the stipulations of this indenture by and under the bond made and executed by the party of the second part as principal and the United States Fidelity and Guaranty Co. as

surety entered into the Sixteenth day of April, 1902, and which is on file in the Indian Office.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above mentioned.

All erasures and interlineations made before signing.

54 Witnesses:[7]

William H. Ansley
Hampton Tucker
Both witnesses of
McAlester, Ind. T.

as to both

as to Napoleon B. Ainsworth, (SEAL)
Trustee for Choctaw Nation.
as to Charles D. Carter (SEAL)
Trustee for Chickasaw Nation.

James J. McDonald
John G. Etzkorn
Both witnesses of
St. Louis, Mo.

as to both

Kansas & Texas Coal Company,
By
as to B. F. Hobart, President (SEAL
as to A. L. Call, Secretary pro tem.
(SEAL)

Revenue stamps,[8] properly cancelled, to amount of One Dollar, affixed to original copy of this lease.

Government Exhibit 1

Bond

Know all men by these presents, that we _____
_____
of _____
as principal, and _____
of _____
and _____
of _____
as sureties, and held and firmly bound unto the United States of America in the sum of _____ dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, successors, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated _____ day of _____ eighteen hundred and ninety _____.

The condition of this obligation is such, that whereas the above-bounden _____

[7] Two witnesses to each signature, including signatures of trustees.

[8] Stamps are required by the act of June 13, 1898, to be placed on leases as follows, viz: Leases for one year, twenty-five cents; for more than one year and not exceeding three years, fifty cents; and for more than three years, one dollar. Lessees must furnish stamps for all leases.

as principal _____ entered into a certain indenture of lease, dated _____ 189_____, with _____ and _____ mining trustees of the Choctaw and Chickasaw nations for the lease of a certain tract of land located in _____ Nation, Indian Territory, for the purpose of prospecting for and mining _____ for the period of _____ years.

Now, if the above-bounden_____ shall faithfully carry out and observe all the obligations assumed in said indenture of lease by_____and shall observe all the laws of the United States and regulations made or which shall be made thereunder, for the government of trade and intercourse with Indian tribes, and all the rules and regulations that have been or may be prescribed by the Secretary of the Interior under the act of June 28, 1898 (30 Stat. 495), relative to mining leases in the Choctaw and Chickasaw nations in the Indian Territory, then this obligation shall be null and void, otherwise to remain in full force and effect. 2

Signed and sealed in the presence of— 3

1. The Christian names and residences of principals, and of the sureties, where personal sureties are given, of whom there must be two.

2. There must be at least two witnesses to all signatures, though the same two persons may witness all.

3. A seal must be attached by some adhesive substance to the signatures of principals and sureties.

Statements of counsel for the plaintiff and defendant and intervener made in open court at the trial of this case

The following is taken from the transcribed record made by the court reporter at the time of the trial:

Statement of Charles N. Champion, Assistant United States Attorney, attorney for the Plaintiff:

* * * "We have not stipulated the terms and conditions of the bond in this case. It so happens when I filed the original suit I did not have a copy of that bond. I learned it had been lost and I have since been unable to obtain a copy. The rules and regulations of the Secretary of the Interior prescribe the form of the bond which was necessary to be executed in matters of this kind by the principal for the fulfillment of the provisions and terms of the lease, and if there is no objection I would like to stipulate what the conditions of this bond was.

56 "Mr. BROADDUS (counsel for the defendant and intervener): I have the form of the bond and it will be agreeable.

to the defendant in this case and intervener to say that that form was used and executed by the principal and it with the blanks filled out made the conditions of these leases in the sum of $75,000, if that is satisfactory.

"Mr. CHAMPION: Yes, sir. We would like to offer this as a form of the bond. (Government's Exhibit #1.)"

Exhibit A

In the United States District Court for the Western Division of the Western District of Missouri

In the Matter of Central Coal and Coke Company, a Corporation, Debtor. In re: Central Coal and Coke Company.

In the Proceedings for Corporate Reorganization, No. 12,287.

In the Matter of the Claim of the United States On Behalf of Choctaw and Chickasaw Tribes Made by A. M. Landman, Superintendent for the Five Civilized Tribes.

Report of James H. Gordon, as Special Master:

The above matter was by order of this Court, dated the 2nd day of December 1935, referred to the undersigned, James H. Gordon of McAlester, Oklahoma, as Special Master, with direction to hear the evidence, allow such amendment to the claim or answer as he may deem fit, require the attendance of necessary witnesses, have the evidence transcribed and reported, together with his findings of facts and conclusions of law, within ninety (90) days.

Pursuant to said order, the said Special Master did, by agreement of attorneys for all parties, set this matter for hearing at Muskogee, Oklahoma, on the 16th day of December 1935, at the United States Court Room. At said hearing, the United States of America and Choctaw and Chickasaw Nations appeared by C. W. Miller, Assistant United States Attorney and W. G. Stigler, Esq., The Central Coal and Coke Company and J. M. Bernardin, trustee for said company, appeared by Bower Broaddus, Esq. The evidence was taken by Charles T. Diffendaffer, Court Reporter, who transcribed the same. The evidence so tran-
57 scribed, with the exhibit and stipulations of the parties and certain additional and amended pleadings, are transmitted herewith, together with the briefs filed herein.

The claim of United States of America is in the amount of $4,800.00 alleged to be due upon Leases One and Two of Central Coal and Coke Company. Of this amount, $2,000.00 is claimed as advance royalty, as provided in the leases, for the years 1930 and 1931. The remainder of the claim in the amount of $2,800.00 is on account of so-called deficit royalty, arising by reason of the

failure to mine or to pay the stipulated royalty upon the amount of coal required to be mined by certain regaulations of the Interior Department of the United States.

Central Coal and Coke Company and its Receiver in their answer deny any indebtedness to the United States or to the Choctaw and Chickasaw Nations on account of the matters set out in their claim herein and allege further by way of counter-claim that the Choctaw and Chickasaw Nations are indebted to said Coal Company and its Receiver in the total sum of $9,364.90, the recovery of which amount is sought herein. The proof introduced shows that if the Central Coal and Coke Company is entitled to recover, the true amount of its recovery is $9,060.90 instead of $9,364.90. The Coal Company in its brief has asked to be allowed to correct its computation and to set out this true amount and the Master has permitted the calculations to be corrected in order that there may be no confusion.

The evidence consists wholly of the testimony of Edward P. Smith, who is and has been for many years a General Clerk in the office of the Spuerintendent for the Five Civilized Tribes, together with the various exhibits introduced in evidence and identified by this witness. No questoon is made by either party as to the correctness of the statements of account prepared by Mr. Smith, nor as to any of the e'hibits. The parties have stipulated that Central Coal and Coke Company was, at all of the times involved here, the owner of Leases numbered One (1), Two (2), Three (3), and Four (4), introduced in evidence.

The first matter to be considered is that of the claim of $2,000.00 on the part of the United States as advance royalty upon Leases numbered One and Two, due June 13, 1930, and
1931. It is admitted that this royalty was not paid except
58 by credits as hereinafter set out. The Act of Congress of June 28, 1928, and the Atoka Agreement, made part thereof, provide:

"All lessees shall pay on each coal or asphalt claim at the rate of $100 per annum, in advance, for the first and second years; $200 per annum, in advance, for the third and fourth years; and $500 for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made; and shall be a credit as royalty when each said mine is developed and operated, and its production is in excess of such guaranteed advance payments, and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped: provided, however, that should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty (60) days after the same

becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall become and be the money and property of the Choctaw and Chickasaw Nations."

It is apparent, under this provision, that after the fourth (4th) year of the lease $500.00 was due each year as advance royalty. There is no denial that this charge of $2,000.00, as advance royalty upon the two leases aforesaid for the years 1930 and 1931, was not paid and is a proper charge and said sum of $2,000.00 must be allowed to the United States in this matter.

The second item claimed by the United States is the sum of $2,800.00 alleged to be due as deficit royalty.

The Department of the Interior in order to stimulate the coal production made certain regulations requiring the lessees, in addition to the payment of the advance royalty and the royalty upon all coal mined, to mine each year a specific amount of coal in a gradually ascending scale ending with a requirement that the lessee mine or pay for 15,000 tons each year after the fourth years. These regulations provide that if this royalty were not paid upon the specified amount of coal, whether mined or not, the leases should become null and void.

The power of the Department of the Interior to re'uire such production was a long matter of contention in the courts. The United States Court for the Eastern District of Oklahoma
59 first held these regulations void in the case of United States ex rel. v. McMurray, 181 Fed. 723; and so held again in the case of United States v. Degnam-McConnell Coal Co. et al., decided September 21, 1915.

It appears that the Department at Washington acquies'ed in these decisions for several years, but finally the matter was again decided by the Circuit Court of Appeals for the Tenth Circuit in the causes of United States v. Missouri, Kansas & Texas R. Co., et al, 66 Fed. 2nd 919, and the companion case of United States v. Eastern Coal and Mining Company, 66 Fed. 2nd, 923; Under these decisions, it appears to the Master that the claim herein of the United States of America for deficit royalty cannot be sustained.

It remains, therefore, to consider the counter-claim of Central Coal and Coke Company and its receiver.

This counter-claim involves two propositions, the first of which relates to a credit claimed by reason of accumulated advanced royalties upon all of the four leases involved here, which credit it was not permitted to use. The second item upon which recovery is sought is on account of deficit royalty paid by the Coal Company by reason of its failure to mine the amount of

coal required by the regulations of the Department of the Interior.

We will consider first the matter of advance royalties paid in and the right to a credit therefor upon coal subsequently mined.

The proof shows that Central Coal and Coke Company held four (4) leases numbered One (1), two (2), three (3), and four (4). Upon Lease numbered one, Central Coal and Coke Company had on June 17, 1920, to its credit the sum of $773.52 and on Lease numbered Two, the sum of $773.28, being the amount of advance royalties paid in excess of the amount due upon coal mined. The Total credit upon these two leases was the sum of $1,546.80.

At the time of the passage of the Act of Congress of June 28, 1928, hereinbefore quoted, a sale of the coal deposits of the Choctaw and Chickasaw Nations appears not to have been contemplated. Such sales were authorized by subsequent Acts of Congress. Central Coal and Coke Company obtained its leases in the year 1902, prior to the passage of the Acts providing for the sale of the coal deposits. Its rights under these leases
60 were fixed by the Act of Congress quoted herein. Pursuant to subsequent legislation, the coal deposits under Leases One and Two of Central Coal and Coke Company were, on June 17, 1920 (Record page 6 under the terms of an advertisement by the United States (r & 10) and pages 2, 3, & 4 of Defendant's Exhibit No. 5), sold. The sale amounted in effect to a contract of sale conditioned upon the performance by the purchaser of the prescribed terms and regulations of the Department.

The Carbon Coal Company, contracting purchaser at said sale, failed to comply with the terms of the sale and its contract was cancelled. According to the terms of this contract of sale, the royalties upon coal mined from the leased premises went to the credit of the purchaser to be applied on the purchase price, and under the terms of said sale, the lessee was not allowed to take credit upon the coal mined for the advance royalties standing to its credit and held by the United States. Such a regulation amounted to a cancellation of the rights to use such credit as granted in the Curtir Bill or the Atoka Agreement. In an attempt to relieve the lessee from this hardship, the regulations provided that this credit might be used against payments coming due by reason of coal mined from other leases owned by the lessee. Central Coal and Coke Company owned additional leases numbered Three and Four, but it was not allowed to take credit for the advance royalties standing to the credit of leases One and Two. When the contract of sale with the Carbon Coal Company was cancelled, all royalties accumulated upon the purchase price were forfeited to the Choctaw and Chickasaw

Nations, and thereafter the status was the same as if no contract of sale had been entered into, but at no time thereafter was Central Coal and Coke Company permitted to take credit for the advance royalties accumulated in the matter of Lease numbered One and Two (R. page 15).

As to Leases numbered Three and Four and coal deposits covered thereby, purchased by the lessee, Central Coal and Coke Company on December 11, 1918, and the purchase approved on August 29, 1919, the purchase price was fully paid (R. page 18). Upon Lease numbered Three there was a credit for advance royalty paid in and held in the sum of $8,600.00, and on the purchase price, the lessee was given credit for $3,800.00. The Act of Congress provided that one-half (½) of the advance royalty should be applied as a credit on the purchase price (R. page
61 19). There is no explanation in the record as to why only $3,800.00 of credit was given, but after deducting $3,800.00, there remained a credit by reason of advance royalties of $4,300.00 The situation existed as to Lease No. 4. The lessee had a right to a credit of the remainder of this advance royalty against any subsequent production of coal on any other lease owned by it. Coal was subsequently mined upon Leases No. 1 and No. 2 in excess of the $4,300.00 credit on each of said leases Nos. 3 and 4 (R. page 20). The refusal of the Department to give such credit was based upon an opinion of the Solicitor (R. page 21 Defendant's Exhibit No. 12). Under this record, I find that Central Coal and Coke Company should have been credited with advanced royalties accumulated on Leases numbered One and Two and also upon Leases numbered 3 and 4. It is argued by the United States that the failure to pay advance royalty upon Leases 1 and 2 for the years 1930 and 1931 rendered the leases void and forfeited to the Choctaw and Chickasa Nations all advance royalties accumulated to such leases. This provision is a part of the Act of June 28, 1928, but no effort has been made by the United States to forfeit these advance royalties, nor has any notice of such intention been given. The claim filed herein does not evidence such an intention and it would seem hardly fair to insist upon such a forfeiture under the facts as shown by this record, where the lessee was denied its right to long standing, proper credits.

The remaining item of defendant's counter-claim is that touching the recovery of certain deficit royalty paid in the sum of $914.10.

The invalidity of these deficit royalty requirements, as determined by the decisions of the courts above mentioned, appears to be settled. The only question of fact involved is whether this amount was voluntarily paid. It is urged by the United States

in its brief that this claim is without merit in that the payment was not made under protest. It appears by the proof that a failure to pay this deficit royalty would result in a concellation of the leases and that all lessees were informed of that fact by the Department (R. pages 16 and 17, and Defendant's Exhibit 9). The requirement to pay violated the Act of Congress but the lessee must either pay or suffer the cancellation of its leases.

It appears that the amount so paid is a proper credit here.

62 Pursuant to the above, I make the following findings of fact and reach the following conclusions of law:

I

I find that the Central Coal and Coke Company has not paid the advance royalty upon Leases numbered One (1) and Two (2) for the years 1930 and 1931, and I conclude that the claim of the United States in the sum of $2,000.00 for advance royalty is proper and the same is allowed.

2

I find that the action of the Department of the Interior in requiring a certain minimum production from Leases numbered One and Two was in violation of the Act of Congress of June 28, 1928, and the Atoka Agreement, and that the claimant, United States of America, has no authority to collect the deficit royalty arising out of such requirements upon said leases, and therefore, the claim of the United States in the sum of $2,800.00 for deficit royalty is disallowed.

3

As to the counter-claim of Central Coal and Coke Company and its Receiver, I find, as to Leases numbered One and Two, that said leases were owned by Central Coal and Coke Company and were duly approved by the Secretary of the Interior, on December 8, 1902; that pursuant to law, the coal deposits covered by said leases, were, on June 17, 1920, sold to Carbon Coal Company, and that said sale was duly approved by the Secretary of the Interior on July 28, 1920. That on October 25, 1929, said sale was cancelled on account of the failure of Carbon Coal Company to comply with its terms. That at the date of said sale, the Central Coal and Coke Company had to its credit as accumulated advance royalties the sum of $773.52 on Lease numbered One, and the sum of $773.28 on Lease numbered Two, or a total of $1,546.80. That Central Coal and Coke Company was entitled to use said amount of credit on coal mined from Leases One and

Two in excess of that amount upon which the royalty would exceed $500.00; that from and after the date of the sale to Carbon Coal Company, Central Coal and Coke Company mined from said Leases One and Two such amounts that the royalty
63 upon same largely exceeded the amount of accumulated advance royalty, and was required by the Department of the Interior to pay the royalties for the coal so mined in cash, and the said Company did pay the same in cash under such requirement, without any deduction on account of advance accumulated royalty; that upon cancellation of said sale to Carbon Coal Company, all amounts paid upon the sale price and all royalties so paid upon coal mined from said leases by Central Coal and Coke Company, were forfeited to the Choctaw and Chickasaw Nations.

4

I, therefore, conclude that Central Coal and Coke Company was unlawfully deprived of its right to credit its accumulated advance royalties upon the coal mined under leases One and Two aforesaid, and that it is entitled to credit herein upon Leases numbered One in the sum of $773.52, and upon Lease numbered Two in the sum of $773.28, a total of $1,546.80.

5

I find that Lease numbered Three (3) referred to in the fifth paragraph of defendant's counter-claim, was executed on April 16, 1902, and approved by the Secretary of the Interior on December 8, 1902. That the Secretary of the Interior did, without legal authority, require the payment of said lease of deficit or minimum royalty to the amount of $9,400.64; that of said amount, the Central Coal and Coke Company was allowed to take credit in favor of other leases mined by it upon the royalty due from such mining operations to the extent of $8,486.54, leaving a balance of $914.10, for which Central Coal and Coke Company never obtained credit. Lessee was notified by the Department that failure to pay would result in cancellation of its lease. Said payments having been exacted without authority of law, the Central Coal and Coke Company is entitled now to a credit therefor in the amount of $914.10.

I, therefore, conclude under and by virtue of the decision in the case of United States of America v. Missouri, Kansas & Texas R. Co., 66 Fed. 2nd 919, and the case of United States of America v. Eastern Coal Company, 66 Fed. 2nd 923, the Central Coal and Coke Company and J. M. Bernardin, Trustee, are entitled

to a credit by virtue of said deficit or minimum royalty collected to the amount of $914.10.

64 Touching the account as to Leases Three and Four, set out in the fourth and fifth paragraphs of defendant's counterclaim, I find the facts to be as heretofore stated: That these two leases were executed on April 16, 1902, and were approved by the Secretary of the Interior on December 8, 1902; that all the times involved in the matter here, Central Coal and Coke Company was the owner of said leases. On the 11th day of December 1919, these leases and the deposits of coal underlying the same were purchased from the Choctaw and Chickasaw Nations through the United States of America, and their sale was duly approved on August 29, 1919. The full amount of the purchase price was paid by Central Coal and Coke Company and deeds to the coal deposits were duly executed and delivered to the purchaser. Up to the time of said sale, these leases were undeveloped and no coal had been mined or produced therefrom, but during the time they were held by Central and Coke Company, that company had paid the yearly advance royalty of $500.00 required by law. Under the terms and provisions of said sale, the purchaser was allowed a credit on the purchase of each lease one-half (½) of the amount of advance royalty so accumulated in the hands of the United States. On the date of said purchase, the sum of $8,600.00 of advance royalties had so accumulated and the purchaser was entitled to a credit on the purchase price of the deposit covered by each lease in the sum of $4,300.00, but for some reason not disclosed by the testimony, the purchaser was given credit for only $3,800.00 on the purchase price of each lease. This left a credit to the purchaser in the hands of the Government of $4,800.00 on each lease.

Under the terms of sale and under the Act of Congress governing such sales, it provided:

"If any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid in by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advanced royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

The Central Coal and Coke Company owned and was oper'ting leases numbered One and Two, hereinbefore referred
65 to, and it was entitled to use the credit by reason of the advance royalties paid in under Leases Three and Four to pay for all coal subsequently mined under Leases One and Two, but the Secretary of the Interior refused to allow credit

upon the coal subsequently mined upon Leases One and Two, but required and received of the Central Coal and Coke Company upon Leases One and Two, in excess of the advance royalty required to be paid each year as follows:

Upon Lease Numbered One, a total of	$2,727.44
Upon Lease Numbered Two, a total of	$11,892.88

It appears that the refusal of the Secretary to allow credit, as above set out, was based upon the fact that the deposits under Leases numbered One and Two had been sold to Carbon Coal Company. Whatever might have been the situation if the sale to the Carbon Coal Company had been complete, the fact is that this sale was cancelled and the Choctaw and Chickasaw Nations again became the owners of these coal deposits, and it would, therefore, seem that under these conditions, the right to a credit for the accumulated advance royalties must be sustained.

There was a credit of $8,600.00 to each lease. There was applied upon the purchase price of the coal deposits under each lease the sum of $3,800.00, leaving a balance of $4,300.00 as a credit to each lease. The proof is specific that more coal was mined from Leases No. 1 and No. 2 than was necessary to absorb the credit in the hands of the Interior Department.

I conclude upon the evidence that the said Central Coal and Coke Company is entitled to a credit, arising out of its right to apply one-half of the accumulated advance royalties upon Leases Numbered Three and Four to the amount of coal mined by it under Leases One and Two, and this amount of credit is $8,600.00.

I, therefore, state the account between the parties to be as follows:

To the United States of America—a credit for advance royalty due upon leases Numbered 1 and 2	$2,000.00
To the Central Coal and Coke Company and its Receiver a credit for advance royalties accumulated in the sum of	$1,546.80
" To the Central Coal and Coke Company and its Receiver a credit on account of deficit or minimum tonnage royalty paid under Department requirements	914.10
To the Central Coal and Coke Company and its Receiver a credit of advance royalties accumulated on Leases numbered 3 and 4	8,600.00
Total credit due Central Coal and Coke Co.	11,060.90
Less amount due United States of America for advance royalty due upon Leases numbered one and two, which was not paid	2,000.00
Balance due Central Coal and Coke Company	9,060.90

While I am of the opinion that Central Coal and Coke Company is entitled to the credits, as set out above, it appears to me that in view of the Acts of Congress, providing that no money shall be expended from Indian Tribal funds without specific appropriation by Congress, except for certain purposes not found

here, this Court can go no further than to render its decree fixing the rights of the parties.

Respectfully submitted.

J. H. GORDON, *Special Master.*

Exhibit B

In the United States District Court for the Western Division of the Western District of Missouri

In the Matter of Central Coal and Coke Company, a Corporation, Debtor.

In Re Central Coal and Coke Company,

In the Proceedings for Corporate Reorganization No. 12287.

In the Matter of the Claim of the United States on Behalf of Choctaw and Chickasaw Tribes Made by A. M. Landman, Superintendent for the Five Civilized Tribes.

Judgment

Now on this the 19th day of February 1936, the exceptions to the Special Master's Report and finding of fact and con-
67 clusions of law, in the matter of the claim of the United States on behalf of the Choctaw and Chickasaw Nations against the Central Coal and Coke Company coming on to be heard, and the United States and the Choctaw and Chickasaw Tribes appearing by William G. Stigler, Esquire, and the Central Coal and Coke Company appearing by John J. Henry and Bower Broaddus, and the Court having heard the argument of counsel and being duly advised approves the finding of fact and conclusions of law, and each and every finding and conclusion, and adopts the said finding of fact and conclusion of law as the finding of this court.

It Is, Therefore, Ordered, Adjudged, and Decreed that the claim of the United States in behalf of the Choctaw and Chickasaw Nations on Lease No. 1 in the amount of One Thousand Dollars ($1,000.00) for advance royalty, and the claim upon Lease No. 2 for One Thousand ($1,000.00) Dollars for advance royalty be and it is hereby allowed; that the Central Coal and Coke Company has a credit against the said amounts, the said credit being as follows:

For advance royalty accumulated upon Lease One and Lease Two in the sum of	$ 1,546.80
Upon deficit or minimum tonnage royalty paid under the requirement of the Secretary of the Interior without authority of law, upon Lease Three	$ 914.10
Upon Lease Three and Four credit for advance royalty accumulated, the sum of	$ 8,600.00
A total of	$11,060.90

leaving the balance due to the Central Coal and Coke Company from the Choctaw and Chickasaw Tribes in the sum of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90).

It Is Ordered, Adjudged, and Decreed that the United States in behalf of the Choctaw and Chickasaw Tribes take nothing by virtue of its claim and the credit of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90) of the Central Coal and Coke Company be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law. To all of which the claimant excepts.

ALBERT L. REEVES, *Judge.*

68 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment in the matter of the claim of the United States on behalf of the Choctaw and Chickasaw Tribes in the matter of Central Coal and Coke Company, in the proceedings for corporate reorganization No. 12287, Now remaining among the records in the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 19th day of February, A. D, 1936.

A. L. ARNOLD,
Clerk.

[SEAL]

By M. C. HAWKINS,
Deputy Clerk.

(Under V of Designation of Defendants)

(Defendant and Interveners request the evidence, two copies of which *which* is furnished herewith, be made a part of the stipulation, and that particularly the stipulation at the conclusion of the evidence, on page 27 and 28 thereof, be shown. Then also show what Exhibits 1 and 2, referred to in the evidence, are admitted, the same being, respectively, Exhibits A and B, attached to plaintiff's petition, otherwise designated as Governments Exhibits #1 and #2, appearing at pages 36 to 41 inclusive in this record.)

Exhibit to stipulation as to facts

In District Court of the United States for the Western Division of the Western District of Missouri

In the matter of Central Coal & Coke Company, a corporation, Debtor. No. 12287.

Record of proceedings had in the Grand Jury Room, Federal Building, Muskogee, Oklahoma, at 9:30 A. M. December 16, 1935, before James H. Gordon, Special Master, on reference made by Honorable Albert R. Reeves, United States District Judge, on December 2, 1935, for the purpose of taking testimony on the issues involved and to report on the law and the facts.

69 Appearances: C. W. Miller, Assistant U. S. District Attorney; W. G. Stigler, Esq.; For the United States of America and Choctaw and Chickasaw Nations. Bower Broaddus, Esq., For Central Coal & Coke Company, and J. M. Bernardin, Trustee for said Company. (Chas. T. Diffendaffer, Reporter.)

The MASTER. The United States of America and Choctaw and Chickasaw Nations ask leave to file a reply to the answer and cross bill of the Central Coal & Coke Company and the trustee J. M. Bernardin. It is agreed by all the parties that this reply will consist of a general denial and that it may be considered filed as of this date, the reply to be sent to the Special Master within five days.

Does the United States desire to introduce any testimony?

Mr. MILLER. Well we want to introduce the leases on which the claim is filed. Mr. Broaddus has that here and they may go in by stipulation or by introduction either one.

The MASTER. The following testimony is introduced by agreement.

EDWARD P. SMITH, produced, sworn, and examined as a witness for and on behalf of the United States and the Choctaw and Chickasaw Nations, testified as follows:

Direct examination by Mr. MILLER:

Q. You may state your name.

A. Edward P. Smith.

Q. What official position do you hold with the Indian Agency?

A. General clerk.

Q. As such clerk do you have in your possession and control the leases on the segregated coal lands of the Choctaw and Chickasaw Nations?

A. Yes, sir.

70 Q. I hand you Government's Exhibit #1 and ask you if that is Lease No. 1 of the Central Coal & Coke Company?

A. Yes, sir; this is Lease No. 1 of the Central Coal & Coke Company at Dow, Oklahoma.

Q. What is the date of that?

A. This lease is dated April 16, 1902.

Q. That lease would expire then under the statute and its terms thirty years from that date; is that right?

A. Yes, sir. That was approved June 13, 1902, by E. A. Hitchcock, Secretary of the Interior.

Q. I hand you Government's Exhibit #2 and ask you if that is the lease known as Central Coal & Coke Company Lease No. 2, near Dow, Oklahoma?

A. It is.

Q. What is the date of that?

A. It is dated April 16, 1902, and it was approved on June 13, 190[illegible].

Mr. M[illegible]ER. We offer Government's Exhibits No. 1 and No. 2 in evidence.

Mr. BROADDUS. I have no objection to them.

Q. You are familiar with the claims filed June 25, 1931, in this proceeding?

A. Yes, sir.

Q. Wherein $4,800.00 was asked on these two leases No. 1 and No. 2?

A. Yes, sir.

Q. Did you help prepare that claim in connection with the then United States Attorney, Philas S. Jones?

A. Yes, sir.

Q. That covers advance royalties on Lease No. 1 for two years due June 13, 1930, and due June 13, 1931?

A. Yes, sir.

Q. $500.00 each?

A. Yes, sir.

Q. For each?

A. Each year; yes sir.

71 Q. On that same lease you also made a claim for deficit royalty $700.00 additional due the first year or June 13, 1930, and the second year June 13, 1931?

A. Yes, sir.

Q. That is all that you claim on Lease No. 1?

A. Yes, sir.

Q. Or a total of $2,400.00?

A. That is right.

Q. Upon Lease No. 2 the anniversary date of that lease was the same as upon Lease No. 1?

A. It was.

Q. Then the payment is not determined by the date of the lease but by the date of the approval; is that correct?

A. No; for advance royalty the date of the lease.

Q. If any at all it would be the same amount due upon Lease No. 2 as upon Lease No. 1 at the same date?

A. Yes, sir.

Q. Then if I understand you if no credits are given in accord with the request and prayer of the Central Coal & Coke Company there would be due upon Lease No. 1 $1,000 for advance royalties and upon lease No. 2, $1,000 for advance royalties?

A. For the two years, yes, sir; that is right.

Q. Now upon Lease No. 1 the minimum tonnage would be for a deficit an additional $1,400.00?

A. For the two years; yes, sir.

Q. Making $4,800.00 in all?

A. That is right.

Q. Nothing has been paid on that claim since it has been filed has it?

A. No, sir.

Cross examination by Mr. BROADDUS:

Q. Captain Smith, since the decision in the Eastern Coal Company and the Katy Railroad case the Government has made no claim for the deficit or minimum royalties has it?

A. No, sir.

72 Q. And as a matter of fact they haven't made it since 1915, early part of the year 1915?

A. Well they made claims. There have been two or three suits filed.

Q. But since the Eastern Coal Company and Katy case the Indian Agency office has accepted that as final that the deficit royalty provision was not a binding provision of the lease?

A. That is right.

(Witness excused.)

(The following evidence was thereupon offered on behalf of the Central Coal & Coke Company and J. M. Bernardin, Trustee for said Company.)

Mr. BROADDUS. We now reoffer as our exhibit Lease No. 1, designated as Government's Exhibit #1, and ask it to be considered as part of our evidence.

EDWARD P. SMITH, recalled as a witness for and on behalf of the Central Coal & Coke Company testified as follows:

Direct examination by Mr. BROADDUS:

Q. The coal deposits under Lease No. 1 were sold pursuant to statute, were they not, Captain?

A. Yes, sir.

Q. And when were those lands sold?

A. I believe it was June 17, 1920.

Q. And to whom were they sold?

A. They were sold to the Carbon Coal Company.

Q. When was that sale approved by the Secretary of the Interior?

A. July 28, 1920.

Q. Was that sale ever completed?

A. No, sir.

Q. Why not?

A. The sale of the coal deposits was cancelled by the Department.

73 Q. And why, Captain?

A. Because of their failure to adopt the extension of time upon certain terms and conditions which the purchasers of the coal and asphalt mineral deposits were given by the act of May 25, 1928 (45 Stat. 737).

Q. Wasn't the real reason that they had failed to make payments due as required by law of a fifth each year and hadn't asked any extension in order to get additional time in which to pay it?

A. Well, that was the reason for cancelling the coal deposits.

Q. The sale of the coal deposits?

A. Yes; the sale of the coal deposits. The Department saw fit to adopt the other reason.

Q. Do you have a letter concerning that?

A. Yes, sir.

Q. Will you produce it please.

(Witness hands counsel carbon copy of letter.)

Mr. BROADDUS. I ask that this be identified as Defendant's Exhibit #3.

Q. Then since the date of that letter, on October 24, 1929, there has been no rights of the Carbon Coal Company to the segregated coal deposits of the lands upon which Lease No. 1 is affected?

A. Yes, sir; that is right.

Q. The Central Coal & Coke Company at the time of the sale was there any advance royalty on hand to the credit of this lease No. 1 at the time of the sale to the Carbon Coal Company of these segregated coal deposits?

A. Yes, sir.

Q. How much was to the credit of this lease on the date of the sale June 17, 1920?

A. $773.52.

Q. Under the rules and regulations of your department and under the terms of the lease and Act of Congress the lessee, the Central Coal & Coke Company, was entitled to use
74 that upon coal subsequently mined prior to the time of the sale, were they not?

A. Yes, sir.

Q. But they were also required to pay $500.00 each year as advance royalty for each subsequent year on the lease, were they not?

A. They were; yes, sir.

Q. And after they used up that $500.00 then they could take credit for this deficit royalty?

A. Yes, sir.

Q. Standing to the credit of the lease?

A. Yes, sir.

Q. Do you have before you the record of coal subsequently mines upon Lease No. 1 after the date of the sale June 17, 1920?

A. Yes, sir.

Q. Will you produce it please.

A. I have made a tabulated statement of it. That was after the sale.

Q. I hand you Defendants' Exhibit #4. I will ask you if that is a true and correct record of the amount of coal mined and paid for subsequent to the sale of the land to the Carbon Coal Company?

A. Yes, sir.

Mr. BROADDUS. May this be introduced the same as the original?

Mr. MILLER: Yes.

The MASTER: No objection. It will be admitted.

Q. Turning to this exhibit I see that you give it by months.

A. Yes, sir.

Q. And the amount of cerdits in the right hand column is the amount that was paid upon these leases subsequent to the time of the sale of the segregated coal land?

A. Yes, sir.

75 Q. Why didn't you give them credit for this $773.52 as they were entitled to under the lease, Captain?

A. The Act of Congress provides, and the regulations provide, that the coal mined after the sale belonged to the purchaser.

Q. Do I understand it to be then a regulation and rule of the Department that after the sale of this property no credits would

be given under the terms of the lease for any advance royalty to the credit of the lease?

A. That is right.

Q. I now hand you Defendants' Exhibit #5 and ask you what that is?

A. This is an advertisement of auction sale of coal and asphalt deposits in the Choctaw and Chickasaw Nations by the United States Government to be offered June 16th and 17th, 1920.

Q. Is that the advertisement under which this property was sold, the Segregated coal deposits were sold covered by Government's Exhibit #1?

A. It is.

Q. Will you turn to the page where the segregated coal land is described?

A. It is at the bottom of page 75 on Lease No. 2 and the top of page 76 for Lease No. 1.

Q. The first is known as "30A"?

A. Yes, sir.

Q. And the second as "30B"?

A. Yes, sir.

Mr. BROADDUS. With the court's permission I will mark those pages 75 and 76 and offer just those two pages.

The MASTER. Any objection?

Mr. MILLER. No objection.

Mr. BROADDUS. I offer in addition thereto pages 2, 3, and 4 of Defendant's Exhibit #5, the same being the terms under which they are sold and bid in and quoting the Act of Congress.

76 Mr. MILLER. No objection.

The MASTER. Admitted without objection.

Q. Had the coal deposits not been sold then the Central Coal & Coke Company could have taken this credit for coal subsequently mined to the amount of $773.42; is that correct?

A. That is correct.

Q. That credit has never been given the Central Coal & Coke Company?

A. No, sir.

Q. The Central Coal & Coke Company, however, did thereafter pay for some coal mined on those premises?

A. Yes, sir.

Q. In excess of $773.52?

A. That is right.

Q. What was the policy of the Department and the Agency at Muskogee in the event they didn't pay and made a claim for their credit, Captain?

A. Well, they denied the claim.

Q. Well if they wouldn't pay for coal subsequently mined was there any threats made to cancel their lease, the lease of the Central Coal & Coke Company?

A. Well, I guess the regulations would cover that. Probably it would be better to introduce the regulations. The regulations provide:

"SECTION 12. Until full and final payment is made for any tract, leased or unleased, all mining operations thereon shall be conducted under the supervision of the representative of the United States Bureau of Mines at McAlester, Oklahoma, and the Mining Trustee of the Choctaw and Chickasaw Nations, or such other officer or officers as the Commissioner of Indian Affairs may designate, and in accordance with existing laws and Department rules and regulations governing the leasing of the segregated coal and asphalt in said Nations. The purchaser of any tract and the lessee thereof, their grantees, lessees, assigns, or successors shall be required to account under oath to said Mining Trustees or officer or officers designated by the Commissioner of Indian
77 Affairs, the number of tons of coal and asphalt mined and removed from such tract, and such Mining Trustee or officer or officers shall have the right to examine all books and records of mining operations of such purchaser, lessee, grantees, assigns, or successors.

"SECTION 13. Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in payment of any installment when due. Any unused advance royalty to the credit of a lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the Act of Congress approved February 8, 1918: Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent of the Five Civilized

Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made."

Q. Otherwise, as I understand it, Captain Smith, if the lease hadn't been sold they would have gotten this credit, but as it was sold on coal subsequently mined they wouldn't let them take credit on advance royalty due at that time.

A. That is right.

Q. And they never have gotten credit from that day until the end of the lease?

A. No, sir.

78 Q. And they paid on amounts of coal subsequently mined on demand from your office?

A. Yes, sir. Those amounts in the statement were applied on the purchase price.

Q. On the amount paid by the Carbon Coal Company?

A. Yes, sir.

The MASTER. Those payments made by the Central Coal & Coke Company were applied you say as a credit on the Carbon Coal Company purchase price?

A. Yes, sir.

The MASTER. Then when the sale was cancelled what attitude did the Carbon Coal Company have in this matter, they simply forfeited those payments?

A. They forfeited those payments and they were credited to the Choctaw and Chickasaw Nations.

Q. Otherwise the Choctaw and Chickasaw Nations got paid twice under the Acts of Congress for the same coal actually mined to the amount of $773.52?

A. Yes, I guess you might term it that way.

Mr. BROADDUS. Returning to Lease No. 2 I reoffer it as Defendants' Exhibit #2.

Q. The segregated coal lands described in that lease were also sold to the Carbon Coal Company?

A. Yes, sir.

Q. It was sold on the same day, approved on the same day and cancelled on the same day?

A. Yes, sir.

Q. And there was to the credit of Lease No. 2 on the day of the sale as advance royalty $773.52?

A. Yes, sir.

Q. Exactly the same amount?

A. It is $773.28.

Q. Upon lease No. 2 after the sale to the Carbon Coal Company coal was mined and paid for over and above the

79 advance royalty falling due on each year in excess of this item of $773.28?

A. Yes, sir.

Q. Have you a statement of that amount on that lease?

A. Yes, sir.

Mr. BROADDUS. I ask it be identified as Defendants' Exhibit #7.

Q. This is a true and exact statement of the amount of coal mined and the royalty paid thereon on lease No. 2 from the date of purchase up until the date of the expiration of the lease?

A. Yes, sir.

Mr. BROADDUS. I now offer it in evidence.

Q. Exactly similar facts apply to that lease as apply to lease No. 1?

A. Yes, sir.

Q. Same regulations and same acts on the part of the Indian Agency?

A. That is correct.

Q. From the date of the sale to the Carbon Coal Company, June 17, 1920, up until the date of cancellation October 25, 1929?

A. That is correct.

Q. You never did permit or haven't permitted up to this day a credit of $773.28 on that lease, have you?

A. No, sir.

Q. And if the segregated coal lands had not been sold they would have had credit for that amount?

A. Yes, sir.

Q. Captain, as to both leases No. 1 and No. 2 that was provided by the Act of Congress under the Curtis Act?

A. On, yes.

Q. And it was a provision in each of the said leases?

A. Yes, sir.

80 Q. Have you in your possession what is known as Lease No. 3 or 30-D?

A. Yes, sir.

Mr. BROADDUS. I ask that this be identified as Defendants' Exhibit #8.

Q. Who was the lessee under No. 3, Central Coal & Coke Company, was it not?

A. Yes, sir.

Q. Did your office, acting under instructions and regulations of the Secretary, allow what is known as minimum tonnage upon this lease?

A. Yes, sir.

Q. Do you have the amount there that they collected on minimum ton'age?

A. Yes, sir.

Q. How much did they collect?

A. $9,400.64.

Q. Under the regulations they could charge all of that if they saw fit against other leases mined by the company?

A. Yes, sir.

Q. And that was charged?

A. Yes, sir.

Q. Left a balance of $914.10 deficit or minimum ton'age that never was accounted for?

A. That is right.

Mr. BROADDUS. While it is not necessary and the court is required to take judicial knowledge, I will ask leave to supply to the stenographer the regulations of the Secretary of the Interior of May 22, 1910, and December 6, 1907, under which this deficit or minimum ton'age was collected.

The MASTER. Any objection to his supplying that?

Mr. MILLER. No, sir.

Q. Captain, what was the policy of the Department in the event this deficit royalty was not paid with reference to cancellation of the lease?

A. They would cancel those leases if it was not paid.

81 Q. Was the Central Coal & Coke Company informed of that fact?

A. Yes, sir.

Q. Were all lessees of Choctaw and Chickasaw segregated coal lands informed of that fact?

A. They were.

Q. Upon the adoption of the regulations of December 6, 1907?

A. Yes, sir. I believe this is the letter notifying them. That is a photostat copy.

Mr. BROADDUS. I offer to introduce it as Defendants' Exhibit No. 9.

Q. The Central Coal & Coke Company had lease No. 4 at Dow, didn't they?

A. Yes, sir.

Mr. BROADDUS. I ask the stenographer to identify it as Defendants' Exhibit #10 and offer Defendants' Exhibit #10 in evidence.

The MASTER. They will go in without objection, unless there is some objection made.

Q. Were the coal lands under leases No. 3 and No. 4 ever sold, Captain?

A. They were.

Q. I ask the stenographer to identify this as Defendants' Exhibit #11. I hand it to you and ask you what that is?

A. That is advertisement of the auction sale of coal and asphalt deposits of the Choctaw and Chickasaw Nations for the year 1918 to be sold on December 11, 12, 13, and 14th.

Mr. BROADDUS. I now offer of that exhibit pages 2, 3, and 4.

Q. Will you find in there the page where the land under leases No. 3 and No. 4 were offered for sale?

A. It is at the bottom of page 78 and top of page 79.

Mr. BROADDUS. I now offer those portions marked on those pages.

The MASTER. Admitted.

82. Q. Were those leases what were known as nonproductive leases?

A. Yes, sir; undeveloped leases.

Q. Leases that never had been mined for any purpose?

A. Yes, sir.

Q. Who bought those leases?

A. Central Coal & Coke Company.

Q. The lessee Central Coal & Coke Company bought those leases?

A. Yes, sir.

Q. They bought both of those leases December 11, 1918, and the purchase was approved August 29, 1919, and they were fully paid for and deed delivered by the Government in the time required by the statute, that is four subsequent payments; is that correct?

A. Yes, sir.

Q. Otherwise the Central Coal & Coke Company purchased and paid for the segregated coal deposits underlying those leases.

A. They did.

Q. Under the Act of Congress of February 20, 1918, Public No. 98?

A. That is 40 Stat. 433.

Q. They were entitled to take as credit upon that coal lease one-half of all advance royalty to the credit of the lease, were they not?

A. Yes, sir.

Q. And how much advance royalty accumulated to the credit of that lease on which they took one-half on each lease?

A. They were given credit for $3,800.00 each.

Q. $3,800.00?

A. Yes, sir.

Q. On each lease?

A. Yes, sir. That is on the purchase price.

83 Q. But there was $8,600.00 advance royalty to the credit of Lease No. 3, was there not?

A. Yes, sir.

Q. As shown by your record?

A. Yes, sir.

Q. And as to Lease No. 4 $8,600.00?

A. Yes, sir.

Q. But they were given credit for only $3,800.00 on their purchase price?

A. That is correct.

Q. There then would still be $4,300.00 on each of the leases No. 3 and No. 4 that was not used; is that correct?

A. Yes, sir. This is the statement that was furnished to the land office at that time. The way they arrived at it was to take the credit to each lease at that time.

Q. Under the terms of sale and under the Act of Congress I have just referred to it is provided: "If any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease, which he may own and operate."

A. That is correct. That is the law.

Q. This property was purchased on December 11, 1918. Was any credit ever given on any other leases for this $4,300.00 to the credit of each of these leases?

A. No, sir.

Q. Was coal subsequently mined upon leases No. 1 and No. 2, as shown by the exhibit heretofore introduced, in excess of the $4,300.00 on each lease and in excess of the advance royalty credit which had been advanced and deficit royalty credits in the first three counts that I have called to your attention?

A. No, sir.

Q. Wasn't there a total of more coal mined than paid for?

A. You mean on lease No. 2?

84 Q. Lease No. 2, have you the total?

A. No; it was something over $10,000.00.

Q. Upon lease No. 1, what was mined?

A. Less than 2000, I think.

Q. If the land had not been sold to the Carbon Coal Company on leases No. 1 and No. 2 would the credits have been given to the Central Coal & Coke Company after their purchase for coal mined on those two leases in accord with the Act of Congress?

A. You mean the original Act of Congress?

Q. Yes.

A. Yes, sir.

Q. Why wasn't credit given upon the royalty due upon leases No. 1 and No. 2 after this purchase of leases No. 3 and No. 4 of the segregated coal deposits upon those two leases?

A. Well that was governed by the opinion of the solicitor. I think this is it here. (Handing counsel Deft. Ex. #12,)

Q. Calling your attention to page 3 of the letter: "In the opinion of the Office the sale of any tract is not complete until approved by the Secretary of the Interior, and any royalty on production due under the leases prior to the date of such approval belongs to the Choctaw and Chickasaw tribes, and any amount due subsequent to that date belongs and should be paid by the lessee to the purchaser." Is that the ruling you are referring to?

A. Yes, sir.

Mr. Broaddus: We offer Defendants' Exhibit #12.

Q. Prior to the sale did a different rule prevail?

A. Yes.

Q. At the time of the purchase of Leases No. 3 and No. 4 of the segregated coal deposits did the Central Coal & Coke Company make inquiry about what would be done with these credits?

A. Yes, sir.

Q. Have you that file?

A. Yes, sir.

85 Q. I hand you Defendants' Exhibit #13 and ask you what that is?

A. That is a letter from the Central Coal & Coke Company dated November 6, 1918, asking about the disposition of royalties on their various leases.

Q. Calling your attention particularly to this portion: "Should leases Nos. 1, 2, 3, and 4 each be sold to a different person, leases Nos. 3 and — being undeveloped, would we have the privilege as in the past of applying excess payments made on leases 3 and 4 to liquidate royalty on coal actually mined from leases 1 and 2, or leases 1, 2, and 3 at Calhoun? We would, of course, have to continue our royalty payments to the individuals as we have in the past to the government, and we wish to know whether, in case each lease is purchased by a different person, we would ever have the privilege of recovering any part of such minimum royalty payments." Was that matter referred to the Department of the Interior for answer?

A. Yes, sir.

Q. And opinion was—well it wasn't exactly an opinion but you did get an opinion on it?

A. We got an expression.

Q. Who was that by?

A. I think is was Mr. Mahaffie.

Q. Mr. Mahaffie, solicitor for the Secretary of the Interior?

A. Yes, sir.

Mr. BROADDUS. I ask this be identified Defendants' Exhibit #14, #14-A and #14-B.

Q. Otherwise if leases No. 1 and No. 2 had not been sold to the Carbon Coal Company subsequent to the sale of leases No. 3 and No. 4, and when I say No. 1 and No. 2 sold I mean the segregated coal deposits, the Central Coal & Coke Company could have taken credit on each of those leases after they completed the purchase in the amount of $4,300.00 each for coal actually mined, could they not?

A. Yes, sir.

86 Q. And, as shown by your tabulation, they mined coal in excess of that amount on Leases No. 1 and No. 2 after they purchased leases No. 3 and No. 4?

A. Yes, sir.

Q. The Choctaw and Chickasaw Nations by virtue of the cancellation of the bid of the Carbon Coal & Coke Company upon segregated coal deposits under leases No. 1 and No. 2 are now the owners of those coal lands?

A. Yes, sir.

Q. And when that was forfeited they got all royalties which had accumulated and which the Central Coal & Coke Company had paid in on those two leases?

A. Yes, sir.

Q. And the Choctaw and Chickasaw Nations got credit for those amounts?

A. Yes, sir; the first sale that leases No. 3 and No. 4 were sold.

Q. That is the segregated coal deposits?

A. Segregated coal deposits, sold on December 11, 1918, and it was more than eight and a half months afterwards before the Secretary approved those sales. During that time leases No. 1 and 2 at Dow were producing quite a lot of coal and they could have applied that against the refund credit to Leases No. 3 and No. 4, but the Department wouldn't permit us to take any action one way or the other, for the reason that they hold that the sale of the coal deposits was not effective until approved by them, and by the time we had arrived at some conclusion about the application they sold the coal deposits under Leases No. 1 and No. 2 and then after the sale, according to the solicitor's opinion, the royalty on coal belonged to the purchasers. Those sales were approved in about a month and a half after the sale.

Q. They finally ruled though that the purchaser was entitled to the royalty on the coal mined between the date of the bid and the date of the final approval?

A. Yes, sir.

Q. I hand you Defendants' Exhibit #15 and ask you if that is a photostat copy of that ruling?

A. Yes, sir.

87 Mr. BROADDUS: I offer it in evidence.

The MASTER. Admitted. In regard to this purchase by the Central Coal & Coke Company of lands covered by Leases No. 3 and No. 4, you say those were unproductive leases. What do you mean by that?

A. There has been no mining nor attempt to mine.

The MASTER. That didn't make any difference in the rights of the parties as to whether there had been mining or not, did it?

A. Oh yes, sir.

The MASTER. What difference did that make?

A. The Act provided if any lessee became the purchaser of an undeveloped tract one-half of the advance royalties paid on that lease should be credited on the purchase price.

The MASTER. I understand, and you are merely referring to that nonoperating lease to show there was no advance royalty credited?

A. Yes, sir.

The MASTER. What was the object and scheme of crediting to the purchaser half of the advance royalties? Why should he be credited with half the advance royalties?

A. That was only in the case of a lessee.

The MASTER. That is where the lessee purchased?

A. Yes, sir. The theory was that when you paid advanced royalty you paid for coal yet to be mined, and then when you sell the deposits to the lessee he has paid already to the extent of the advance royalty paid. So Congress gave a lessee more preference than a nonlessee in the purchase of coal deposits.

Q. The property was appraised at a certain value at the date of sale?

A. Yes, sir.

The MASTER. The advance royalty claim was allowed because the party already had a right to take out a part of the coal which was actually sold to him?

A. Yes, sir.

88 The MASTER. Why didn't they allow the entire advance royalty under that theory to be credited on the purchase price?

A. The entire amount was allowed under that Act if he owner other leases.

The MASTER. And he could credit it on other leases?

A. Yes, sir, and this company then owned other leases. They owned for instance No. 1 and No. 2, but No. 1 and No. 2 were sold to others than the lessee.

The MASTER. Now support this lessee didn't own any other leases; he was allowed a credit on his purchase price of half of the advanced royalty, and what was the intention of the Act as to the remainder of the advanced royalty paid in?

A. I suppose that would go to the Choctaw and Chickasaw Nations, but the Choctaw, Oklahoma & Gulf has a case pending in the District of Columbia covering the other half. That hasn't been decided yet.

The MASTER. I just never was able to see the reasoning why the lessee was entitled to half of the royalty instead of being entitled to all of it, because the idea would carry through the whole the amount to be mined to take up that advance royalty.

Q. Captain, the Central Coal & Coke Company owned seven leases, didn't they, at the time they purchased leases No. 3 and No. 4?

A. Yes, sir.

Q. And the only amount the government claims on any of these leases is the amount the claim was filed for in this case?

A. Yes, sir.

Q. All other sums have been paid?

A. Yes, sir.

Q. Up to the time of the sale of this property to the Carbon Coal Company of leases No. 1 and No. 2 under your regulations, the seven leases were treated as one so far as any credits were concerned?

A. Yes, sir.

89 Q. And that was permitted by a letter from the Secretary of the Interior himself.

A. Yes, sir.

Q. Have you got that letter?

A. Yes, sir.

Mr. BROADDUS. We offer it as defendants' Exhibit #16.

The MASTER. Do you deny the right as to the advance royalties on Leases No. 1 and No. 2?

Mr. BROADDUS. I don't deny it except I claim they have these credits. I admit as to leases No. 1 and No. 2 that advance royalty wasn't paid for those years, but the reason it wasn't paid was because they owed us more than we owed them.

The MASTER. But they are entitled to a credit?

Mr. BROADDUS. Yes.

Mr. STIGLER. We offer in evidence Government's Exhibit #3.

Mr. BROADDUS. No objection.

Stipulation relative to claim.

It is stipulated by and between the parties that the claim was filed in this case under and pursuant to authority issuing from

the Secretary of the Interior, and approved by the Attorney General, and that after the counter claim was filed it was stipulated between the parties the matter might be submitted to the Special Master, Honorable James H. Gordon. That the Central Coal & Coke Company was the owner of the leases and has been such owner since December 8, 1902, by virtue of assignment from the original lessee, duly approved by the Secretary of the Interior as to each lease, and that the following portion of a letter is admitted in evidence as Defendant's Exhibit #17.

Defendant's Exhibit 5

Auction Sale of Coal and Asphalt Deposits Leased and Unleased

The Coal and Asphalt herein described comprise all of such minerals unsold, Leased and Unleased, underlying the
90 segregated area in Pittsburg, Latimer, LaFlore, Coal, Atoka, and Pushmataha Counties, in the Choctaw Nation, and Carter and Murray counties in the Chickasaw Nation, Oklahoma, except certain tracts that have heretofore been offered with the entire estate and sold. The area of the coal and asphalt offered consists of 399,004 acres, of the total appraised value of $13,188,905.56 and is contained in 463 tracts averaging 853⅛ acres to the tract, of which 375 tracts containing 318,819 acres are Unleased and 88 tracts containing 80,185 acres are Leased. The tracts vary in area from 40 to 1600 acres each, and the minimum prices thereof from $600.00 to $108,797.70 per tract, and will be offered for sale at Public Auction in accordance with Act of Congress approved February 8, 1918. (Public No. 98-65th Congress) in front of the Post Office, at 9 o'Clock A. M., at McAlester, Oklahoma, November 13, 14 and 15, 1919.

For convenience, Coal and Asphalt have been divided into district, as follows:

District	Unleased		Coal		Leased	
	No. tracts	Acreage	Total appraisement	No. tracts	Acreage	Total appraisement
McAlester	76	53,409	$1,295,739.30	38	34,503	$1,116,145.56
Wilburton	40	41,894	1,385,861.90	11	11,153	795,527.79
Stigler	27	25,392	981,744.35			
Howe-Poteau	72	63,979	2,044,382.18	10	9,594	330,928.35
McCurtain-Massey	90	77,926	2,787,011.75	16	12,371	595,549.12
Lehigh-Ardmore	63	55,259	1,435,273.55	9	9,644	367,752.01
			Asphalt			
Choctaw Nation	1	960	9,600.00			
Chickasaw				4	2,920	53,400.00
	375	318,819	$9,939,602.73	88	80,185	$3,259,302.83

The coal is bituminous and semibituminous, and of various grades and qualities, consisting mainly of Low Volatile Bunker Coal for Steamship use, High Grade Domestic Coal, Railroad Steam Coal, High Grade Blacksmith Coal, and Coking Coal. It is in seams averaging 4 feet thick, with an average dip of from 10 to 15 degrees, outcropping at the surface and existing to a vertical depth below the surface estimated to be 2,300 feet at the deepest part of the basin; some of the present mine workings are under a vertical cover of from 200 to 1,300 feet.

Practically all of the tracks offered are located near cities, towns, and railroads, many being crossed by railroads, making them easily accessible and attractive for mining.

No preference right will be given any person, firm, or corporation to purchase any tract of the coal and asphalt offered
91 except to coal lessees of tracts held by them under existing leases, and the State of Oklahoma to purchase the coal and asphalt underlying the grounds of the State Penitentiary heretofore acquired by purchase. Such preference right to be given only upon compliance with the conditions provided for such purpose by law and the regulations governing the sale.

Prospective Purchasers should Inspect any Tract or Tracts They May Desire to Bid on, and Satisfy Themselves as to the Quality and Condition of the Coal and Asphalt Contained Therein, as no Guaranty is made Relative Thereto.

No person, firm, or corporation will be permitted to acquire more than 4 tracts of 960 acres each, except where such person, firm, or corporation has such tracts under existing valid lease.

Bids may be submitted in person or by agent with written power of attorney, or by mail addressed to the Superintendent for the Five Civilized Tribes at McAlester, Oklahoma. Minimum and maximum bids sent by mail will also be considered. All bids by mail should be sent to McAlester, Oklahoma, so as to reach there not later than the hour set for the sale. Certified check, draft, or money order payable to D. Buddrus, Cashier, in an amount equal to twenty per cent (20%) of the maximum bid, must accompany each bid, and each tract must be bid for separately. Bids for a fractional portion of a tract and for less than the minimum price of any tract as advertised will not be considered. All bids will be accepted subject to the approval of the Secretary of the Interior, and, after approval, certificates of purchase will be issued to the purchasers. When full payment is made, patents will be issued conveying to the purchasers title to the coal and asphalt, as provided by law.

Terms: Twenty per cent (20%) of the purchase price at the time of the sale, and the remainder in four equal annual install-

ments, payable in one, two, three, and four years, respectively, from the date of sale. All deferred payments bear 5 per cent (5%) interest per annum from date of sale. All royalties on tracts now under lease, and on any lease made on unleased tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him and paid to the purchasers after full payment has been made or in annual installments in the discretion of the Secretary of the Interior.

92 All sales made shall be upon the express conditions provided for in Section 4 of the Act of Congress approved February 20, 1918 (Public—No. 98, 65th Congress), which reads in part as follows:

"SECTION 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any persons acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than the appraised value, and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the ad-

vance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such
93 lessee on account of any production of coal on any other lease which he may own and operate: And, provided, That nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and twelve."

Until full payment is made, all mining operations on any Leased tract sold, and on any lease on any sold Unleased tract made subsequent to the sale thereof, and prior to the completion of the payments and issuance of deed, shall be conducted under the supervision of the Representative of the United States Bureau of Mines, and the Mining Trustees of the Choctaw and Chickasaw Nations, at McAlester, Oklahoma, or such other officer or officers as the Secretary of the Interior may designate, and in accordance with existing law and departmental rules and regulations governing the leasing of coal and asphalt in said Nations.

The sale of the coal and asphalt does not include the surface or right thereto, except that lessees of said minerals have the right to enter upon the surface acquired by them for mining purposes, as provided in Section 3 of the Act of Congress approved February 19, 1912 (37 Stat. L. 67), which reads as follows:

"That sales of the surface under this Act shall be upon the conditions that the Choctaw and Chickasaw Nations, their grantees, lessees, assigns, or successors, shall have the right at all times to enter upon said lands for the purpose of prospecting for coal or asphalt thereon, and also the right of underground ingress and egress, without compensation to the surface-owner, and upon the further condition that said nations, their grantees, lessees, assigns, or successors, shall have the right to acquire such portions of the surface of any tract, tracts, or rights thereto as may be reasonably necessary for prospecting or for the conduct of mining operations or for the removal of deposits of coal and asphalt upon paying a fair valuation for the portion of the surface so acquired. If the owner of the surface and the then owner or lessee of such mineral deposits shall be unable to agree upon a fair valuation for the surface so acquired, such valuation shall be determined by three arbitrators,
94 one to be appointed in writing, a copy to be served on the other party by the owner of the surface, one in like manner by the owner or lessee of the mineral deposits, and the

third to be chosen by the two so appointed; and in case the two arbitrators so appointed should be unable to agree upon a third arbitrator within thirty days, then and in that event upon the application of either interested party, the United States district judge in the district within which said land is located shall appoint the third arbitrator: Provided, That the owner of such mineral deposits or lessee thereof shall have the right of entry upon the surface so to be acquired for mining purposes immediately after the failure of the parties to agree upon a fair valuation and the appointment, as above provided, of an arbitrator by the said owner or lessee."

Descriptive Lists of the tracts of coal and asphalt offered are for free distribution which lists give tract numbers, minimum price of each tract, the area thereof, and general information pertaining thereto.

Blue-Print Maps Of Each District, showing the tract numbers and area thereof, location of leased and unleased tracts, outcrops, railroads, etc., will be furnished without charge. In addition to the district maps, Fractional Or Sheet maps of these districts on a larger scale, showing the location of the leased and unleased tracts, approximate worked-out area, mines, railroads, towns, etc., will be furnished for $1 each. Application therefor should be made to the Superintendent for the Five Civilized Tribes at McAlester, Oklahoma.

When Full and Final Payment Is Made for Any Tract Sold, and Patent Thereto Has Issued, Federal Government Supervision and Authority over All Leases and Mining Operations by Reasons of the Indian Ownership Will Terminate.

The right to waive technical defects in the advertisement and bids, to reject any and all bids, and to approve or disapprove any and all sales, is reserved.

During the advertisement and sale of the coal and asphalt an office will be maintained at McAlester, Oklahoma, where prospective bidders may personally inspect plats, maps, Government reports, analysis of the coal and asphalt, etc., and be furnished with all available information.

95 For Further Information, or for maps and descriptive lists apply to the Superintendent for the Five Civilized Tribes, McAlester, Oklahoma.

The United States Government sends out no advertising or exhibit cars to advance or exploit the sale of Indian lands. All such concerns are private enterprises in no wise connected with the Government.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

Defendant's Exhibit 6

* * * * * * *

McAlester District (North Map). Leased—Continued

Tract No. on map description	Area	Appraisement	
		Per acre	Total
30A, S2 of S2 of Sec. 32, Twp. 6 N., R. 16 E. All of Sec. 5 and N2 of N2 of Sec. 8, Twp. 5 N., R. 16 E.	955.28	$25.00	$23,882.00

Central Coal & Lumber Company, Lease No. 2.

Located on the Wilburton Branch of the Missouri, Kansas & Texas Railway. Lease expires April 16, 1932. About 150 acres is located behind the coal outcrop and 90.28 acres has been mined out, leaving 715 acres underlaid with the McAlester seam about 2 ft. 10 in. thick, with a dip of about 10 degrees.

Remarks concerning the Hartshorne seam in Central Coal & Lumber Company's Lease No. 1 apply to this tract.

In 1908 Mr. Cameron reported 150 acres behind the crop and 26 acres mined out, leaving 784 acres of workable coal which he valued at $30 per acre, or a total of $23,520.

Since date of Mr. Cameron's report more acreage has been mined out.

McAlester District (North Map). Leased—Continued

Tract No. on map description	Area	Appraisement	
		Per acre	Total
30B, E2 of E2 of Sec. 1, Twp. 5 N., R. 15 E. and *al lot* Sec. 6 and N2 of NE4; NE4 of NW4; Lot 1 of Sec. 7, Twp. 5 N., R. 16 E.	958.10	$18.00	$17,325.00

96 Central Coal & Lumber Company, Lease No. 1.

Located on the Wilburton Branch of the Missouri, Kansas & Texas Railway. Lease expires April 16, 1932. About 200 acres is located behind the coal outcrop of the McAlester seam; 290.10 acres mined out, leaving 468 acres underlaid with the McAlester seam 3 ft. 2 in. thick, with a dip of about 13 degrees. Although the Hartshorne seam also underlies this tract, it is considered of no value at this time on account of its great depth; therefore the appraisement as indicated in the above schedule is considered to be the present fair value of the coal rights underlying this tract.

Mr. Cameron in 1908 reported 200 acres behind the crop and 274 acres mined out, leaving 486 acres of workable coal which he valued at $30 per acre, or a total of $14,580.

Mr. Cameron was evidently misinformed as to the area behind the crop.

* * * * * * * *

[Defendant's exhibits 8 and 10, Indian Territory Coal Mining Leases, appear in identical form at printed pages 45–50 of the record and are therefore omitted here.]

Defendant's Exhibit 11

Auction Sale of Coal and Asphalt Deposits, Leased and Unleased

The Coal and Asphalt herein described comprise all of such minerals, Leased and Unleased, underlying the segregated area in Pittsburg, Latimer, LeFlore, Haskell, Coal, Atoka, and Pushmataha counties, in the Choctaw Nation, and Carter and Murray counties, in the Chickasaw Nation, Oklahoma, except certain tracts that have heretofore been offered with the entire estate and sold. The area of the coal and asphalt offered consists of 441,107 acres, of the total appraised value of $14,538,441.73, and is contained in 517 tracts averaging 853⅛ acres to the tract, of which 389 tracts, containing 328,276 acres, are Unleased, and 128 tracts, containing 112,830 acres, are Leased. The tracts vary in area of from 20 to 1,358.89 acres each, and the minimum prices thereof vary from $20 to $108,797.70 per tract, and will be offered for sale at Public Auction in accordance with the Act of Congress approved February 8, 1918 (Public, No. 98, 65th Congress), in front of the Post Office, at 9 o'Clock A. M., at McAlester, Oklahoma, on December 11, 12, 13, and 14, 1918.

97

For convenience, the Coal and Asphalt have been divided into districts, as follows:

District	Unleased Coal			Leased Coal		
	No. tracts	Acreage	Total appraisement	No. tracts	Acreage	Total appraisement
McAlester	85	60,493.20	$1,494,882.30	63	54,347.49	$1,708,414.79
Wilburton	49	44,354.10	1,476,223.10	11	10,871.35	781,527.19
Stigler	27	25,392.45	981,744.35			
Howe-Potosu	72	64,615.45	2,087,002.48	11	10,887.23	366,219.95
McCurtain-Massey	91	78,736.71	2,850,796.95	14	11,602.58	532,883.82
Lehigh-Ardmore	64	53,734.49	1,434,234.75	24	21,542.09	747,112.05
Choctaw Nation	1	960.00	9,600.00			
Chickasaw Nation				5	3,880.00	67,800.00
Total	389	328,276.40	10,334,483.93	128	112,830.74	4,203,957.80

The coal is bituminous and semibituminous, and of various grades and qualities, consisting mainly of Low Volatile Bunker Coal for Steamship Use, High Grade Domestic Coal, Railroad Steam Coal, High Grade Blacksmith Coal, and Coking Coal. It is in seams averaging 4 feet thick, with an average dip of from 10 to 15 degrees, outcropping at the surface and extending to a vertical depth below the surface estimated to be 2,300 feet at the deepest part of the basin; some of the present mine workings are under a vertical cover of from 200 to 1,300 feet.

Practically all of the tracks offered are located near cities, towns, and railroads, many being crossed by railroads, making them easily accessible and attractive for mining.

No preference right will be given any person, firm, or corporation to purchase any tract of the coal and asphalt offered except to coal lessees of tracts held by them under existing leases, and the State of Oklahoma to purchase the coal and asphalt underlying the grounds of the State Penitenitary hertofore acquired by purchase. Such preference right to be given only upon compliance with the conditions provided for such purpose by law and the regulations governing the sale.

Prospective Purchasers Should Inspect Any Tract or Tracts They May Desire to Bid On, and Satisfy Themselves as to
98 the Quality and Condition of the Coal and Asphalt Contained Therein, as No Guaranty is Made Relative Thereto.

No person, firm, or corporation will be permitted to acquire more than 4 tracts of 960 acres each, except where such person, firm, or corporation has such tracts under existing valid lease.

Bids may be submitted in person or by agent with written power of attorney, or by mail addressed to the Superintendent for the Five Civilized Tribes at McAlester, Oklahoma. Minimum and maximum bids sent by mail will also be considered. All bids by mail should be sent to McAlester, Oklahoma, so as to reach there not later than the hour set for the sale. Certified check, draft, or money order payable to D. Buddrus, Cashier, in an amount equal to twenty per cent (20%) of the maximum bid, must accompany each bid, and each tract must be bid for separately. Bids for a fractional portion of a tract and for less than the minimum price of any tract as advertised will not be considered. All bids will be accepted subject to the approval of the Secretary of the Interior, and, after approval, certificates of purchase will be issued to the purchasers. When full payment is made, patents will be issued conveying to the purchasers, title to the coal and asphalt, as provided by law.

Terms: Twenty per cent (20%) of the purchase price at the time of the sale, and the remainder in four equal annual install-

ments, payable in one, two, three and four years, respectively, from the date of sale. All deferred payments bear 5 per cent (5%) interest per annum from date of sale. All royalties on tracts now under lease, and on any lease made on unleased tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him and paid to the purchasers after full payment has been made or in annual installments in the discretion of the Secretary of the Interior.

All sales made shall be upon the express conditions provided for in Section 4 of the Act of Congress approved February 20, 1918 (Public—No. 98, 65th Congress), which reads in part as follows:

"SECTION 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any persons acquiring said deposits of coal or asphalt shall take
99 the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than appraised value, and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease

shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate: And, provided, That nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and twelve."

Until full payment is made, all mining operations on any Leased tract sold, and on any lease on any sold Unleased tract made subsequent to the sale thereof, and prior to the completion of the payments and issuance of deed, shall be conducted under the supervision of the Representative of the United States Bureau of Mines, and the Mining Trustees of the Choctaw and Chickasaw Nations, at McAlester, Oklahoma, or such other officer or officers as the Secretary of the Interior may designate, and in accordance with existing law and departmental rules and regulations governing the leasing of coal and asphalt in said Nations.

The sale of the coal and asphalt does not include the surface or right thereto, except that coal lessees now holding mining leases on any of the tracts offered for sale have the preferential right to purchase at the appraised value any or all of the surface reserved by them for mining purposes, approved by the Secretary of the Interior, prov'ded such right is exercised within ninety days after the approval of the appraisement thereof; and except that lessees of said minerals have the right to enter upon the surface acquired by them for mining purposes, as provided in Section 3 of the Act of Congress approved February 19, 1912 (37 Stat., L. 67), which reads as follows:

"That sales of the surface under this Act shall be upon the conditions that the Choctaw and Chickasaw Nations, their grantees, les'ees, assigns, or successors, shall have the right at all times to enter upon said land for the purpose of prospecting for coal or asphalt thereon, and also the right of underground ingress and egress, without compensation to the surface owner, and upon the further condition that said nations, their grantees, lessees, assigns, or successors, shall have the right to acquire such portions of the surface of any tract, tracts, or rights thereto as may be reasonably necessary for prospecting or for the conduct of mining operations or for the removal of deposits of coal and asphalt upon paying a fair valuation for the portion of the surface so acquired. If the owner of the surface and the then owner or lessee of such mineral deposits shall be unable to agree upon a fair valuation

for the surface so acquired, such valuation shall be determined by three arbitrators, one to be appointed in writing, a copy to be served on the other party by the owner of the surface, one in like manner by the owner or lessee of the mineral deposits, and the third to be chosen by the two so appointed; and in case the two arbitrators so appointed should be unable to agree upon a third arbitrator within thirty days, then and in that event upon the application of either interested party, the United States district judge in the district within which said land is located shall appoint the third arbitrator: Provided, That the owner of such mineral deposits or lessee thereof shall have the right of entry upon the surface so to be acquired for mining purposes immediately after the failura of the parties to agree upon a fair valuation and the appointment, as above provided, of an arbitrator by the said owner or lessee."

Descriptive Lists of the tracts of coal and asphalt offered are for free distribution, which lists give the tract numbers, minimum price of each tract, the area thereof, and general information pertaining thereto.

Blue-Print Maps of Each District, showing the tract numbers and area thereof, location of leased and unleased tracts, outcrops, railroads, etc., will be furnished without charge. In addition to the district maps, Fractional or Sheet maps of these districts on a larger scale, showing the location of the leased and unleased tracts, approximate worked-out area, mines, railroads, towns, etc., will be furnished for $1 each. Application therefor should be made to the Superintendent for the Five Civilized Tribes at McAlester, Oklahoma.

When Full and Final Payment is Made for Any Tract Sold, and Patent Thereto Has Issued, Federal Government Supervision and Authority Over All Leases and Mining Operations by Reason of the Indian Ownership Will Terminate.

The right to waive technical defects in the advertisement and bids, to reject any and all bids, and to approve or disapprove any and all sales, is reserved.

During the advertisement and sale of the coal and asphalt an office will be maintained at McAlester, Oklahoma, where prospective bidders may personally inspect plats, maps, Government reports, analysis of the coal and asphalt, etc., and be furnished with all available information.

For Further Information, or for maps and descriptive lists apply to the Superintendent for the Five Civilized Tribes, McAlester, Oklahoma.

The United States Government sends out no advertising or exhibit cars to advance or exploit the sale of Indian lands.

102 All such concerns are private enterprises in no wise connected with the Government.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

* * * * * * *

McAlester District (North Map), Leased—Continued

Tract No. on map description	Area	Appraisement	
		Per acre	Total
30D, S2 of SW4; NE4 of SE4 of Sec. 14 and SE4 of Sec. 15 and E2 of SW4 of Sec. 15 and NE4; E2 of NW4; NE4 of SE4 of Sec. 22; W. 2 of Sec. 23, Twp. 5 N., R. 16 E	960	$40.00	$38,400.00

Central Coal & Lumber Company, Lease No. 3.

Located on a one-mile spur of the Chicago, Rock Island & Pacific Railroad. Lease expires April 16, 1932. About 130 acres is located behind the coal outcrop and no coal has been mined out, leaving 830 acres underlaid with the Hartshorne seam about 4 ft. thick, with a dip of about 15 degrees.

The coal underlying this tract is somewhat defective and such fact has been considered in fixing the appraisement as indicated in the above schedule.

In 1908 Mr. Cameron reported 130 acres behind the crop leaving 830 acres of workable coal which he valued at $50 per acre or a total of $41,500.00.

McAlester District (North Map), Leased—Continued

Tract No. on map description	Area	Appraisement	
		Per acre	Total
30E, W2 of SW4 of Sec. 15 and S2 of NW4; S2 of Sec. 16 and S2 of NE4; SE4 of Sec. 17 and N2 of N2 of Sec. 21 and W2 of NW4 of Sec. 22, Twp. 5 N., R. 16 E	960	$45.00	$43,200.00

Central Coal & Lumber Company, Lease No. 4.

Located on a half-mile spur of the Chicago, Rock Island & Pacific Railroad. Lease expires April 16, 1932. About 90 acres is located behind the coal outcrop, leaving 870 acres
103 underlaid with the Hartshorne seam 4 ft. thick, with a dip of about 15 degrees.

In 1908 Mr. Cameron reported 90 acres behind the crop leaving 870 acres if workable coal which he valued at $50 per acre or a total of $43,500.00.

* * * * * * *

In United States District Court

Stipulation of facts in lieu of deposition

Filed Nov. 23, 1937

It is stipulated and agreed by and between the plaintiff, acting through Honorable Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and Bower Broaddus of the firm of Broaddus & Fite that in lieu of the deposition, notice of which was served in this case to be taken in Washington on Tuesday, the 10th day of August 1937, at the office of the Comptroller General of the United States, the following facts are stipulated, subject to such objections as to relevancy, competency and materiality as either party may desire to make:

That heretofore on the 8th day of December 1936, the defendant, The Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, filed with the General Accounting Office of the United States a claim or claims as shown by the exhibit attached hereto, made a part hereof and marked Exhibit "A," and that said exhibit is a true and correct copy of said claim so filed on said date/ That thereafter R. N. Elliott, the duly Acting Comptroller General of the United States, and on May 11, 1937, mailed to the Central Coal and Coke Company, the principal upon the bond sued on in the above case, the following letter, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B."

COMPTROLLER GENERAL OF THE UNITED STATES.

A-85744 *Washington, May 11, 1937.*

CENTRAL COAL AND COKE COMPANY,
c/o *Broaddus and Fite, Esqs.,*
528-535 Equity Building, Muskogee, Oklahoma

GENTLEMEN: Reference is made to letter of December 8, 1936, from Broaddus and Fite, Esqs., transmitting your claim for an allowance under the provisions of section 774 of Title 28, U. S. C. A. Section 951, Revised Statutes, of certain amounts
104 claimed to be due you by reason of the alleged illegal collection by the Department of the Interior, acting for the Choctaw and Chickasaw Nations, of royalties on certain coal leases on the segregated coal lands of the said nations. The attorneys state that they are in doubt whether this is a claim against the United States under the cited law but that in order to show good faith in presenting the matter as required by the statutes, they submit a claim and request that the same receive attention as promptly as possible.

With respect to the submission of the claim to this office for consideration pursuant to the provisions of section 951, Revised Statutes, you are informed that it is the conclusion of this office that the said section has no application to the instant matter and with respect to the action of the Secretary of the Interior in denying your claim, your attention is invited to the provisions of the act of June 28, 1898, 30 Stat. 505, which provides, among other things, that the royalties due under these leases shall be collected and deposited into the Treasury of the United States to the credit of the Choctaw and Chickasaw Nations and that such funds may be drawn from the Treasury under such rules and regulations as shall be prescribed by the Secretary of the Interior. That there has been no showing that either the collection of the funds in question or application thereof were contrary to said regulations, and in such circumstances there would appear to be no basis for refunding the same.

Resp'ctfully,

(Signed) R. N. ELLIOTT,
Acting Comptroller General of the United States.

That these exhibits may be received in evidence without further proof, the same as the original exhibit, subject to the objections heretofore referred to.

This 23 day of August 1937.

CLEON A. SUMMERS, *United States Attorney*
for the Eastern District of Oklahoma.
By CHARLES N. CHAMPION, *Ass't U. S. Attorney.*

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By BOWER BROADDUS
BROADDUS & FITE,
Attorneys.

105 (Exhibit "A" referred to in the stipulation sets out the same facts, exhibits, and information as set forth in the answer of the Central Coal and Coke Company referred to in the stipulation filed November 23, 1937, in this cause, which stipulation is not dated and includes the supporting affidavit and exhibits all of which are shown elsewhere in the record.)

[File Endorsement Omitted.]

IN UNITED STATES DISTRICT COURT

Plaintiff's Request For Findings Of Fact And Conclusions Of Law filed March 10, 1938.

Comes now the United States of America, acting on and in behalf of the Choctaw and Chickasaw Nations, and requests that the Court herein make certain findings of fact and conclusions of law as required hereinafter.

I

That the judgment obtained in the United States District Court for the Western Division of the Western District of Missouri in the matter of the Central Coal and Coke Company, a corporation, Debtor, No. 12287, by the Central Coal and Coke Company, be and the same is hereby declared invalid.

II

The court is requested to find that the United States Fidelity and Guaranty Company, the defendant herein, and surety for the Central Coal and Coke Company, cannot avail itself of the defenses which its principal, the Central Coal and Coke Company, may or would have in this cause of action.

III

In the event the court finds that the United States Fidelity & Guaranty Company, as surety, can avail itself of any or of all of the defenses of its principal, it is not entitled to the credits allowed by the Special Master and adopted by the United States District Court at Kansas City, Missouri, as its findings of fact and conclusions of law as off-sets or counterclaims.

IV

(1) As to Lease One, the court is requested to find that the same was duly executed by the Trustees of the Choctaw
106 and Chickasaw Nations upon the lands described therein, under date of April 16, 1902, and was duly approved by the Secretary of the Interior on December 8, 1902, and at all times hereinafter mentioned, the Central Coal and Coke Company was the owner and in possession of the leasehold estate and operated the same.

(2) That the segregated coal deposits under said land described in said lease were offered for sale and bid in by the Carbon Coal Company, a corporation, on June 17, 1920, and that the sale was approved by the Secretary of the Interior on July 28, 1920; that the said sale was duly cancelled on October 24, 1928, for the reason that the payment required to be made upon the purchase price had not been paid within the time required

by law or within the time of any extension which may have been requested had the Carbon Coal Company so desired under subsequent Acts of Congress.

(3) That on the date of the sale to the Carbon Coal Company there was to the credit of Lease One for advance royalty theretofor' paid upon the said lease and not used, a credit in the sum of $773.52. That under Acts of Congress and rules and regulations of the Secretary of the Interior, no credits shall be given under the terms of the lease for any advance royalty to the credit of the lease after the sale of the deposits. Accordingly, after the sale of the deposits under Lease One to the Carbon Coal Company on June 17, 1920, the sum of $773.52 was credited on the purchase price as the purchaser of the deposits was entitled to said credit and not the operator of said lease. Had the coal deposits not been sold, then the Central Coal and Coke company could have taken credit for coal subsequently mined to the amount of $773.52.

(4) It is therefore concluded that in Count II of the cross-complaint of the Trustee, J. A. Berna'din and Central Coal and Coke Company, the said Trustee is not entitled to the credit of $773.52.

V

(5) As to Lease Two, the Court is requested to fine that the same was duly executed by the Trustees of the Choctaw and Chickasaw Nations upon the land described therein, under late of April 16, 1902, and was duly approved by the Secretary of the Interior on December, 8, 1902, and at all times hereinafter mentioned, the Central Coal and Coke Company was the owner and in possession of the leasehold estate and operated the same.

167

(6) That the segregated coal deposits under said land described in said lease were offered for sale and bid in by the Carbon Coal Company, a corporation, on June 17, 1920 and that the sale was approved by the Secretary of the Interior on July 28, 1920; that the said sale was duly cancelled on October, 25, 1929 for the reason that the payment required to be made upon the purchase price had not been paid within the time required by law or within the time of any extension which may have been requested had the Carbon Coal Company so desired, under subsequent Acts of Congress.

(7) That on the date of the sale to the Carbon Coal Company, there was to the credit of Lease Two for advance royalty theretofore paid upon the said lease and not used, a credit in the sum of $773.28. That under Acts of Congress and rules and

regulations prescribed by the Secretary of the Interior, no credits shall be given under the terms of the lease for any advance royalty to the credit of the lease after the sale of the deposits. Accordingly, after the sale of the deposits under Lease Two to the Carbon Coal Company on June 17, 1920, the sum of $773.28 was credited on the purchase price, as the purchaser of the deposits was entitled to said credit and not the operator of said lease. Had the coal deposits not been sold, then the Central Coal and Coke Company could have taken credit for coal subsequently mined to the amount of $773.28.

(8) It is therefore concluded that in Count III of the cross-complaint of the Trustee, J. A. Berna'din and Central Coal and Coke Company, the said Trustee is not entitled to the credit of $773.28.

VI

That in Count IV upon Lease Three, the following findings be made:

(9) That said Lease Three was executed on April 16, 1920, and approved by the Secretary of the Interior on December 8, 1902.

(10) That under the terms and provisions of the said lease and the Curtis Act, under which it was authorized, and
108 subsequent regulations, the Secretary of the Interior had sufficient authority to require payment of deficit or minimum tonnage royalty.

(11) That under the provisions of said lease and the Curtis Act, the Secretary of the Interior collected deficit or minimum tonnage royalty in the amount of $914.10 as being due upon the said Lease Three, and the same being paid without protest, the Central Coal and Coke Company, and J. J. Berna'din, Trustee, are not entitled to a return thereof.

(12) It is, therefore, concluded under and by virtue of the authority contained in the said lease and the Curtis Act and rules and regulations, the Secretary of the Interior collected said deficit or minimum tonnage royalty for the benefit of the Choctaw and Chickasaw Nations, and the same being paid without protest, the Central Coal and Coke Company and J. M. Berna'din, Trustee, are not entitled to a credit of the said amount.

VII

That as to Lease Three, the Court finds as follows:

(13) That Lease Three was duly executed April 16, 1902, covering the premises described therein and approved Decem-

ber 8, 1902, and that at all times hereinafter mentioned, the said lease was owned and operated by the Central Coal and Coke Company. That on December 11, 1918, under and pursuant to the Act of February 28, 1918, and the rules and regulations promulgated for the sale of segregated coal deposits, the Central Coal and Coke Company bid in said property described in said leases; said bid was accepted and the sale approved under date of August 29, 1919; that the full amount of the purchase price was thereafter paid by the Central Coal and Coke Company and the deeds to the coal deposits duly executed and delivered by the tribal authorities and with the approval of the Secretary of the Interior in the time required by law.

(14) That under the terms and provisions of the said sale there was to the credit of the said Lease three the sum of $8,600.00, one-half of which sum was applied to the purchase price of the said segregated coal deposits and had not the coal deposits under Leases One and Two been sold to the Carbon Coal Company, the Central Coal and Coke Company
109 would have been entitled to the credit for the balance of $4,300.00 of said advance royalty on account of production of coal actually mined on Leases One and Two. That the Choctaw and Chickasaw Nations, by virtue of the cancellation of the bid of the Carbon Coal Company upon the segregated coal deposits under Leases One and Two, became the owners of the coal lands when the sale was forfeited and the tribes were entitled to all the royalty which had accumulated and which the Central Coal and Coke Company had paid in on these two leases.

(15) At the time of the approval of said sale, the Central Coal and Coke Company was owner and operator of Leases One and Two, heretofore referred to, but on June 17, 1920, the said Carbon Coal Company purchased the coal deposits under Leases One and Two and such sums paid upon coal mined from said leases were credited by the Secretary of the Interior on the purchase price of said deposits; and when the purchasers, the Carbon Coal Company, failed to complete its purchase, all rights thereunder were forfeited to the Choctaw and Chickasaw Nations.

(16) That of the said sums so paid, $4,300.00 was not exacted without authority of law and contrary to the provisions of Congress under which the said sale was held.

(17) It is, therefore, concluded that the Trustee, J. M. Bernardin, and the Central Coal and Coke Company are not entitled to the credit of $4,300.00.

VIII

(18) That as to Lease Four, the Court finds as follows: That Lease Four was duly executed April 16, 1902, covering the premises described therein, and approved December 8, 1902, and that at all times hereinafter mentioned, the said lease was owned and operated by the Central Coal and Coke Company. That on December 11, 1918, under and pursuant to the Act of February 28, 1918, and the rules and regulations promulgated for the sale of segregated coal deposits, the Central Coal and Coke Company bid in the said property described in said lease; said bid was accepted and the sale approved under date of August 29, 1919; that the full amount of the purchase price was thereafter paid by the Central Coal and Coke Company and the deeds to
110 the coal deposits duly executed and delivered by the tribal authorities and with the approval of the Secretary of the Interior in the time required by law.

(19) That under the terms and provisions of the sale there was to the credit of the said Lease Four the sum of $8,600.00, one-half of which said sum was applied to the purchase price of the said segregated coal deposits and had not the coal deposits under Leases One and Two been sold to the Carbon Coal Company, the Central Coal and Coke Company would have been entitled to a credit for the balance of the $4,300.00 of said advance royalty on account of production of coal actually mined on Leases One and Two. That the Choctaw and Chickasaw Nations, by virtue of the cancellation of the bid of the Carbon Coal Company upon the segregated coal deposits under Leases One and Two, became the owners of the coal lands when the sale was forfeited and the tribes were entitled to all the royalty which had accumulated and which the Central Coal and Coke Company had paid in on these two leases.

(20) At the time of the approval of said sale, the Central Coal and Coke Company was owner and operator of Leases One and Two, heretofore referred to, but on June 17, 1920, the said Carbon Coal Company purchased the coal deposits under Leases One and Two and such sums paid upon coal mined from said leases were credited by the Secretary of the Interior on the purchase price of said deposits and when the purchaser, the Carbon Coal Company, failed to complete its purchase, all rights thereunder were forfeited to the Choctaw and Chickasaw Nations.

(21) That of the said sums so paid, $4,300.00 was not exacted without authority of law and contrary to the provisions of Congress under which the said sale was held.

(22) It is, therefore, concluded that the Trustee, J. M. Berna'din, and the Central Coal and Coke Company are not entitled to the credit of $4,400.00.

IX

(23) That upon Lease One, advance royalty due June 13, 1930, amounting to $500.00, and advance royalty due June 13, 1931, amounting to $500.00 was not paid by the Central Coal and Coke Company, and is still due from said company.

(24) That upon Lease Two, advance royalty due June 13, 1930, amounting to $500.00, and advance royalty due June 13,
111 1931, amounting to $500.00 was not paid by the Central Coal and Coke Company and is still due from said company.

(25) That the total amount due under Lease One and two, for advance royalty is the sum of $2,000, and the Trustee, J. M. Berna'din, and Central Coal and Coke Company are not entitled to a total credit of $11,060.90, or any other sum but there is due from the United States Fidelity and Guaranty Comapny to the Choctaw and Chickasaw Nations, the sum of $2,000.00.

CHARLES N. CHAMPION,
Assistant U. S. District Attorney.

W. G. STIGLER,
Choctaw National Attorney.

[File endorsement omitted.]

In United States District Court

Defendant's request for findings of fact and conclusions of law

Filed Jan. 31, 1938

Come now the defendants, United States Fidelity and Guaranty Company, a corporation, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, and requests that the Court make findings of fact and conclusions of law as requested hereinafter:

(1) That the United States District Court for the Western Division of the Western District of Missouri had jurisdiction of the subject matter and of the parties in the proceedings in the said court.

(2) That the said claim was filed under and pursuant to Section 18 of the Act of April 26, 1906 (1934 Stat. at Large, Section 144), authorizing the said proceeding to be brought by the Secretary of the Interior and when so brought allowing cross-actions and counter-claims to be filed for amounts that may be due from the Indian Tribes to the party sued.

(3) That the judgment of the United States Court for the Western Division of the Western District of Missouri, duly entered in said court on February 19, 1936, was a valid judgment.

112 And the defendants request upon the above finding of fact that the Court conclude as a matter of law that the judgment of the United States District Court for the Western District of Missouri determines all the issues in this case and is res adjudicata.

(4) That such judgment is a bar to the recovery of any sum whatsoever against the defendant United States Fidelity and Guaranty Company, a corporation.

The defendants United States Fidelity and Guaranty Company, a corpoartion, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, further request findings of fact and conclusions of law with reference to the cross-petition and counterclaim of the Central Coal and Coke Company, a corporation, filed by its trustee herein, as follows:

(5) As to Lease No. 1 the court is requested to find that the same was duly executed by the trustee of the Choctaw and Chickasaw Nations upon the lands described therein, under date of April 16, 1902, and was duly approved by the Secretary of the Interior on December 8, 1902, and at all times hereinafter mentioned the Central Coal and Coke Company was owner and in possession of the leasehold estate and operated the same.

(6) That the segregated coal deposits under said land described in said lease was offered for sale and bid in by the Carbon Coal Company, a corpoartion, on June 17, 1920, and that the sale was approved by the Secretary of the Interior on July 28, 1920; that the said sale was duly cancelled October 25, 1929, for the reason that the payment required to be made upon the purchase price had not been paid within the time required by law or within the time of any extension which may have been requested had the Carbon Coal Company so desired under subsequent acts of Congress.

(7) That on the date of the sale to the Carbon Coal Company there was to the credit of Lease No. 1 for advance royalty theretofore paid upon the said lease, and not used, a credit in the sum of $773.52. That under the terms and provisions of the Curtis Act and under the provisions of the said lease it was provided that such payments "shall be considered as advance royalty on the mine or claim on which they are made and shall be credited

113 as royalty when each of said mines is developed and operated and its production is in excess of such guaranteed annual advance payment." That notwithstanding the said provisions of said lease and notwithstanding that coal was mined after

the date it was purchased by the Carbon Coal Company, that is, on June 17th, 1920, the Department of the Interior, acting through the Secretary of the Interior, his officers and agents, refused to charge coal subsequently mined on said lease against the said credit but demanded and received of the Central Coal and Coke Company for coal subsequently mined a sum of money in excess of the credit, in cash, from the Central Coal and Coke Company, and which sum under the provision of the said Curtis Act and lease the Secretary of the Interior was not entitled to receive for the use and benefit of the Choctaw and Chickasaw Nations and which sum was collected for the Choctaw and Chickasaw Nations.

(8) It is therefore concluded that the United States Fidelity and Guaranty Company, J. M. Bernardin; Trustee of the Central Coal and Coke Company, a corporation, and the Central Coal and Coke Corporation, a corporation, is entitled to credit of $773.52.

(9) As to Lease No. 2 the Court is requested to find that the same was duly executed by the Trustees of the Choctaw and Chickasaw Nations upon the lands described therein under date of April 16, 1902, and was duly approved by the Secretary of the Interior on December 8, 1902, and at all times hereinafter mentioned the Central Coal and Coke Company was owner and in possession of the leasehold estate and operated the same.

(10) That the segregated coal deposits under said land described in said lease was offered for sale and bid in by the Carbon Coal Company, a corporation, on June 17, 1920, and that the sale was approved by the Secretary of the Interior on July 28, 1920; that the said sale was duly cancelled October 25, 1929, for the reason that the payment required to be made upon the purchase price had not been paid within the time required by law or within the time of any extension which may have been requested had the Carbon Coal Company so desired under subsequent acts of Congress.

(11) That at the date of the sale to the Carbon Coal Company there was to the credit of Lease No. 2 for advance royalty
114 theretofore paid upon said lease, and not used, a credit in the sum of $773.28. That under the terms and provisions of the Curtis Act, and under the provisions of the said lease, it was provided that such payments "Shall be considered as advance royalty on the mine or claim on which they are made and shall be credited as royalty when each of said mines is developed and operated and its production is in excess of such guaranteed annual advance payment." That notwithstanding the said provisions of said lease and notwithstanding the fact that coal was mined after the date it was purchased by the Carbon Coal Company, that is, on June 17, 1920, the Department of the Interior,

acting through the Secretary of the Interior, his officers and agents, refused to charge coal subsequently mined on said lease against the said credit but demanded and received of the Central Coal and Coke Company for coal subsequently mined a sum of money in excess of the credit in cash, and which sum under the provisions of the said Curtis Act and lease the Secretary of the Interior was not entitled to receive for the use and benefit of the Choctaw and Chickasaw Nations, and which sum was collected for the Choctaw and Chickasaw Nations.

(12) It is therefore concluded that the United States Fidelity and Guaranty Company, J. A. Bernardin, trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, is entitled to credit of $773.28.

That upon Lease No. 3 the following findings be made:

(13) That said Lease No. 3 was executed on April 16, 1902, and approved by the Secretary of the Interior on December 8, 1902.

(14) That under the terms and provisions of the said lease and the Curtis Act, under which *is* was authorized, the Secretary of the Interior was without authority to require payment of any deficit or minimum tonnage royalty.

(15) That notwithstanding the provisions of the said lease and the Curtis Act, the Secretary of the Interior did collect deficit or minimum royalty to the amount of $914.10 as being due upon the said Lease No. 3.

(16) It is concluded under and by virtue of the authority in the case of United States of America v. Missouri Kansas &
115 Texas Ry. Co. 66 Fed. (2d) 919 and the case of United States of America v. Eastern Coal Company, 66 Fed. (2d) 923, that the United States Fidelity and Guaranty Company, a corporation, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, are entitled to a credit by virtue of the said deficit or minimum tonnage royalty collected to the amount of $914.10.

That as to Lease No. 3 the Court is requested to find as follows:

(17) That Lease No. 3 was duly executed April 16, 1902, covering the premises described therein and approved December 8, 1902, and that at all times hereinafter mentioned the said lease was owned and operated by the Central Coal and Coke Company. That on December 11, 1918, under and pursuant to the Act of February 28, 1918, and the Rules and Regulations promulgated for the sale of segregated coal deposits on the lease the Central Coal and Coke Company bid in the said property described in said lease; said bid was accepted and the sale approved under date of August 29, 1919; that the full amount of the said purchase price was thereafter paid by the Central Coal and Coke

Company and the deeds to the coal deposits duly executed and delivered by the Tribal authorities and with the approval of the Secretary of the Interior in the time required by law.

(18) That under the terms and provisions of the said sale there was to the credit of the said Lease No. 3 the sum of $8,600.00, one-half of which said sum was applied to the purchase price of the purchase price of the said segregated coal deposits and the Central Coal and Coke Company was entitled to a credit for the balance of $4,300.00 of said advance royalty on account of any production of coal on any other lease which it may have owned and operated. That the said segregated coal deposits were in a lease known as an undeveloped lease, that is up to the time of the purchase and at the time of the completion of the said sale no coal had been mined or produced under and by virtue of the terms of the lease.

(19) That at the time of the approval of the said sale the Central Coal and Coke Company was the owner and operator of Lease No. 1 and No. 2, heretofore referred to, and it was
116 entitled to use the credit of advance royalty under Lease No. 3 to pay for all coal subsequently mined by virtue of Lease No. 1 and No. 2, and that notwithstanding the provisions of Section 4 of the Act of Congress, approved February 28, 1918, the Secretary of the Interior refused to allow credit upon the coal subsequently mined upon Lease No. 1 and 2 but required and received of the Central Coal and Coke Company upon Lease No. 1 and No. 2, in excess of the advance royalty required to be paid in each year, as follows: Upon Lease No. 1 a total of $2,727.44, and upon Lease No. 2 a total of $11,892.88.

(20) That of the said sum so paid $4,300.00 thereof was exacted without authority of law and contrary to the provisions of Congress under which the said sale was held.

(21) It is concluded that the United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, are entitled to a credit of $4,300.00.

That as to Lease No. 4 the Court is requested to find as follows:

(22) That Lease No. 4 was duly executed April 16, 1902, covering the premises described therein, and approved December 8, 1902, and that at all time hereinafter mentioned the said lease was owned and operated by the Central Coal and Coke Company. That on December 11, 1918, under and pursuant to the Act of February 28, 1918, and the Rules and Regulations promulgated for the sale of segregated coal deposits, the Central Coal and Coke Company bid in the said property described in said lease; said bid was accepted and the sale approved under date of Au-

gust 29, 1919; that the full amount of the said purchase price was thereafter paid by the Central Coal and Coke Company and the deeds to the coal deposits duly executed and delivered by the Tribal authorities and with the approval of the Secretary of the Interior in the time required by law.

(23) That under the terms and provisions of the said sale there was to the credit of the said Lease Four the sum of $8,600.00, one-half of which said sum was applied to the purchase price of the said segregated coal deposits and the Central Coal and Coke Company was entitled to a credit for the balance of the $4,300.00 of said advance royalty on account of any
117 production of coal on any other lease which it may have owned and operated. That the said segregated coal deposits were under a lease known as an undeveloped lease, that is up to the time of the purchase and at the time of the completion of the said sale no coal had been produced or mined under and by virtue of the terms of the lease.

(24) That at the time of the approval of the said sale the Central Coal and Coke Company was the owner and operator of Lease No. 1 and No. 2, heretofore referred to, and it was entitled to use the credit of advance royalty under Lease No. 4 to pay for all coal subsequently mined by virtue of Lease No. 1 and No. 2, and that notwithstanding the provisions of Section 4 of the Act of Congress approved February 28, 1918, the Secretary of the Interior refused to allow credit upon the coal subsequently mined upon Lease No. 1 and No. 2 but required and received of the Central Coal and Coke Company upon Lease No. 1 and No. 2, in excess of the advance royalty required to be paid each year, as follows: Upon Lease No. 1 a total of $2,727.44 and upon Lease No. 2 a total of $11,892.88.

(25) That the said sum so paid $4,300.00 thereof was exacted without authority of law and contrary to the provisions of Congress under which the said sale was held.

(26) It is concluded that the United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a corporation, and Central Coal and Coke Corporation, a corporation, are entitled to a credit of $4,300.00.

(27) That the total amount paid upon Lease No. 1 subsequent to the purchase of Lease No. 3 by the Central Coal and Coke Company, and in excess of the advance royalty requirements, amounts to $2,727.44, and crediting thereupon $773.52, the amount of advance royalty to the credit of Lease No. 1 at the time the said Lease No. 1 was sold to the Carbon Coal Company there would be a balance of $1,953.92, that being the sum paid by the Central Coal and Coke Company upon lease No. 1, and which it should

have not been required to pay because of the credits they had after it purchased the segregated coal deposits under Leases No. 3 and No. 4.

(28) That there was mined upon Lease No. 2, after the sale of the segregated coal deposits underlying Leases No. 3 and No. 4, in excess of the advance royalties requirement of said
118 lease, a total of $11,892.88, and after deducting therefrom the sum of $773.28, the amount of advance royalty to the credit of Lease No. 2 at the time the said Lease No. 2 was sold to the Carbon Coal Company, would leave a balance of $11,119.60, that being the amount which the Central Coal and Coke Company paid upon coal subsequently mined upon Lease No. 2, after the purchase of the segregated coal deposits underlying the land described in Lease No. 4.

(29) Defendants further request as a matter of law that the deficit or minimum tonnage on Lease No. 1 due July 13, 1930, in the amount of $700.00, and the like royalty due June 13, 1931, in the sum of $700.00 is an improper charge on the lease and was never due.

(30) Defendants further request, as a matter of law that the deficit or minimum tonnage royalty on Lease No. 2, due July 13, 1930, in the amount of $700.00 and a like royalty due June 13, 1931, in the sum of $700.00 is an improper charge on the lease and was never due.

(31) That the said J. M. Bernardin, Trustee for the Central Coal and Coke Company, a corporation, and its successor, the Central Coal and Coke Corporation, a corporation, is entitled to a total credit of $11,060.90 and a judgment against the Choctaw and Chickasaw Tribes in the sum of $9,060.90.

(32) That the Central Coal and Coke Company, a corporation, is insolvent, and was at the time of the institution of this suit, and it has consented and requested that the said credit be allowed upon the amount claimed by the plaintiff, which request is hereby granted, and that the United States Fidelity and Guaranty Company, because of the insolvency of its principal, Central Coal and Coke Company, a corporation, has a right to assert all such credits and cross-demands.

BROADDUS AND FITE,
Attorneys For United States Fidelity and Guaranty Company, a corporation,
J. M. BERNARDIN,
Trustee for Central Coal and Coke Company, a corporation,
Central Coal and Coke Corporation, a corporation.

[File endorsement omitted.]

119 In United States District Court

Findings of fact and conclusions of law

Filed Aug. 27, 1938

Findings of fact

The court finds the following to be the facts in this case:

(1) That pursuant to the provisions of an Act of Congress the Trustees of the Choctaw and Chickasaw Nations on April 16, 1902, executed two certain coal mining leases to the Kansas and Texas Coal Company, known as Lease No. I and Lease No. II, described as follows:

Lease No. 1. The east half of the east half of Section 1, Township 5 North, Range 15 East, and all of Section 6, and the North Half of the North Half of Section 7, Township 5 North, Range 16 East.

Lease . II. The south half of the south half of Section 32, Township 6 North, Range 16 East, and all of Section 5 and the north half of the north half of Section 8, Township 5 North, Range 16 East.

That the said leases were duly approved by the Secretary of the Interior on the 13th day of June, 1902, for a term of thirty years from the date of the execution thereof; that Exhibits "A" and "B" attached to the plaintiff's petition are true and correct copies of the said leases.

That as part and parcel of the same transaction the United States Fidelity and Guaranty Company, the defendant herein, as surety executed the bond in the sum of $75,000.00 conditioned as set forth in the copy attached to plaintiff's petition and marked Exhibit "C," and that said copy is a true and correct copy.

That thereafter on August 25, 1902, the lessee Kansas and Texas Coal Company duly assigned and transferred to the Central Coal and Coke Company, a corporation organized and existing under the laws of the State of Missouri, the said leases and which assignments were duly approved by the Secretary of the Interior on December 8, 1902; that the defendant in this action, United States Fidelity and Guaranty Company, a corporation, consented to the said assignment and transfer and agreed that the bond should remain in full force and effect, the same as though the Central Coal and Coke Company, a corporation, was the original principal.

120 That thereafter, on or about June 25, 1931, in the United States District Court for the Eastern District of Oklahoma, in a cause entitled First National Bank of Chicago, Illinois, plaintiff, vs. Central Coal and Coke Company, defendant,

J. M. Bernardin, receiver, Equity 4245, the Superintendent of the Five Civilized Tribes for and in behalf of the Choctaw and Chickasaw Nations duly filed his claim for the royalties and rentals set forth and sued for in this action, which claim omitting caption, is in words and figures as follows:

(Claim for royalties of the Choctaw and Chickasaw Nations appears in identical form at page 34 of the printed record and is therefore omitted here.)

That such proceeding was an ancillary proceeding to a like action in the United States District Court for the Western Division of the Western District of Missouri, in the matter of the Central Coal and Coke Company, a corporation, debtor, #12287. It was agreed that the claim so filed in the United States District Court for the Eastern District of Oklahoma should be considered as filed in the said cause and the said agreement was between the United States Attorney for the Eastern District of Oklahoma and the said Receiver of the Central Coal and Coke Company, the same being J. M. Bernardin.

That thereafter the Central Coal and Coke Company duly filed in the said United States District Court for the Western Division of the Western District of Missouri, the cause being #12287, its answer to the claim of the United States for the Choctaw and Chickasaw Tribes, and which answer, omitting the caption, is in words and figures as follows:

(Answer of J. M. Bernardin, Trustee of Central Coal and Coke Company appears in identical form at page 36 of the printed record and is therefore omitted here.)

That thereafter pursuant to stipulation of the parties in the said cause Honorable Albert L. Reeves, Judge of the said Court, duly entered his order appointing James H. Gordon of McAlester, Oklahoma, as Special Master to make his finding of fact and conclusions of law with reference to said claim of the United States and the answer thereto of the Central Coal and Coke Company, which order, omitting the caption is in words and figures as follows:

121 (Order appointing Special Master appears in identical form at page 42 of the printed record and is, therefore, omitted here.)

That pursuant to said order the matter was duly heard before the said special master and he made his findings of fact and conclusions of law upon the said issues presented by the said claim and answer and cross-petition in which he found that there was due the Choctaw and Chickasaw Tribes on Lease I the sum of $1,000.00 or advance royalty, and upon Lease II the sum of $1,000.00 for advance royalty, and that the princi-

pal upon such bond, the said Central Coal and Coke Company, had a credit against the said sums, by reason of the cross-petition and cross-action filed as set forth heretofore as follows:

For Advance Royalty accumulated upon Lease One and Lease Two in the sum of	$1,546.80
Upon deficit or minimum tonnage royalty paid under the requirement of the Secretary of the Interior without authority of law, upon Lease Three	$914.10
Upon Lease Three and Four credit for advance royalty accumulated, the sum of	$8,600.00
Total	$11,060.90

This left a balance due the Central Coal and Coke Company from the Choctaw and Chickasaw Tribes the sum of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90).

That thereafter on February 19, 1936, the United States having filed exceptions to the Special Master's report and the same coming on to be heard before the Honorable Albert L. Reeves, Judge of the United States District Court for the Western Division of the Western District of Missouri, and the court having heard argument of counsel and being duly advised approved the findings of fact and conclusions of law and each and every finding and conclusion and adopted the same as the findings of the court, and duly entered his judgment thereon. Said judgment being as follows:

(Judgment, signed by Albert L. Reeves, Judge, appears as Exhibit B to stipulation of facts at page 66 of the printed record and is therefore omitted here.)

122 There has been no appeal from said judgment and no steps taken for such appeal.

That the Central Coal and Coke Company is a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in Kansas City, Missouri. That the said Central Coal and Coke Company is the principal upon the bond sued upon by the plaintiff and is owner and holder of the claim heretofore set forth; that at the time of filing the petition herein the said Central Coal and Coke Company was insolvent and had been duly adjudicated an insolvent corporation, and a receiver appointed.

After the judgment was obtained in the United States District Court for the Western District of Missouri, and before the trial of this cause, the Central Coal and Coke Company and the Central Coal & Coke Corporation, a corporation, filed with the General Accounting Office of the United States the identical claim or claims which had been plead in the proceeding in the

United States District Court for the Western District of Missouri. The claim was filed with the General Accounting Office of the United States on the 8th day of December 1936, and, on May 11, 1937, the Acting Comptroller General of the United States denied said claim. The contention of the United States Government had been that under the provisions of Section 774, Title 28, U. S. C. A., Section 951, Revised Statutes, the claim should be filed with the General Accounting Office of the United States and disallowed before a court would have jurisdiction to consider said claim and enter a judgment based thereon. The claim that was filed on December 8, 1936, was transmitted for allowance under said Section 774, Title 28, U. S. C. A., Section 951, Revised Statutes. The claim was disallowed by the Acting Comptroller General of the United States and in his letter disallowing the claim the following language was used:

"With respect to the submission of the claim to this office for consideration pursuant to the provisions of Section 951, Revised Statutes, you are informed that it is the conclusion of this office that the said section has no application to the instant matter * * *."

It was stipulated by the parties that the evidence taken before the Special Master, James H. Gordon, be submitted to this court and received by this court as evidence in this
123 case in the event it is material for a determination of this case.

It was also admitted by the parties that the claim of the Central Coal and Coke Company, prior to the time the judgment was rendered in the United States District Court for the Western District of Missouri, had never been presented to the General Accounting Office of the United States and disallowed, and the record of the proceedings had before the United States District Court for the Western District of Missouri fails to show that said claim had been presented to the General Accounting Office of the United States. Upon the trial of this cause it was the contention of the United States Government that the judgment rendered by the United States District Court for the Western District of Missouri was void for the reason that the claim which was the basis of said judgment had not been presented to the General Accounting Office of the United States and by that department disallowed. It was the contention of the defendant that it was not necessary to present said claim to the General Accounting Office of the United States in order to set it up in this action pending before the United States District Court for the Western District of Missouri, that the controlling statute was Section 18 of the Act of April 26, 1906 (34 Stat. 137), rather than Section 774, Title 28, U. S. C. A.

The parties also agreed upon the trial of this cause that in the event the judgment of the United States District Court for the Western District of Missouri is held to be a valid judgment the plaintiff is not entitled to recover in this action.

Conclusions of law

(1) Since the government concedes it is not entitled to recover in this action unless the judgment of the Missouri court is void, the first question for consideration is the validity of said judgment and, unless it be void, no other question need be considered.

(2) Every presumption is in favor of the validity of a judgment of a court of competent jurisdiction. Voorhees v. Jackson, 10 Peters 449; 9 L. Ed. 490. As stated in Voorhees v. Jackson:

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed
124 to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

(3) It is not necessary to determine whether or not the claim of the Central Coal & Coke Company set up in the Missouri court was controlled by Section 774, Title 28, U. S. C. A., Section 951 Revised Statutes, as contended for by the Government, or by Section 18 of the Act of April 26, 1906 (34 Stat. 137), as contended by the Central Coal & Coke Company. In either event the Missouri Court had jurisdiction of the parties and of the subject matter.

(4) Conceding that Section 774, Title 28, U. S. C. A., is the applicable statute the Missouri Court had jurisdiction to pass on the claim of the Central Coal & Coke Company and it was not necessary that the Central Coal & Coke Company allege that the claim had been submitted to the General Accounting Office of the United States and by it disallowed, U. S. v. Standard Aircraft Corp., 16 Fed. (2d) 307.

(5) When a court has jurisdiction of the parties and the subject matter its judgment, though erroneous, is not void and subject to a collateral attack. The remedy is by appeal. The principle is announced in Voorhees v. Jackson, supra, as follows:

"The distinction between error in judgment and usurpation of power is definite; the one denotes cases where a judgment is reversible by the appellate court, the other where it may be declared a nullity collaterally."

(6) It must be presumed that the Missouri court in rendering said judgment considered both statutes, that contended for by the Government and that contended for by the Central Coal & Coke Company. Its decision to proceed under the statute contended for by the Central Coal & Coke Company, even if erroneous, would not go to the jurisdiction of the court to render judgment but at most would be error not subject to collateral attack. Insley v. U. S. 150 U. S., 512.

125 (7) Although not deemed necessary for a decision of this case, this court is of the opinion that the statute controlling the claim of the Central Coal and Coke Company in the Missouri Court was Section 18 of the Act of April 26, 1906 (34 Stat. 137).

(8) The judgment of the Missouri court entered on February 19, 1936, is a valid judgment and not subject to collateral attack in this proceeding.

(9) Under the admission of the Government that it is not entitled to recover in this action if the judgment of the Missouri Court is not void, it follows that judgment should be entered for the defendant. Proper journal entry of judgment will be prepared and presented for signing at Muskogee at 9 A. M. on the 3rd day of September 1938.

(Signed) EUGENE RICE, *Judge.*

[File endorsement omitted.]

In United States District Court

Opinion

Filed Sept. 3, 1938

Briefly the facts out of which this controversy arose are as follows: In 1902 the Trustees for the Choctaw and Chickasaw Nations executed two certain coal mining leases to the Kansas and Texas Coal Company. These leases by assignment became the property of the Central Coal and Coke Company. At the time of the execution of the leases the United States Fidelity and Guaranty Company, a corporation, executed a bond in the sum of $75,000.00 conditioned upon the faithful performance by the lessee of the conditions named in the leases. The surety company agreed to the various assignments by and through which the Central Coal and Coke Company became the owner of the leases. The Central Coal and Coke Company, a corporation, filed proceedings in bankruptcy under the corporation reorganization law in the United States District Court for the Western District of Missouri. J. M. Bernardin was appointed

trustee. In an ancillary proceeding in the United States District Court for the Eastern District of Oklahoma, in a cause entitled First National Bank of Chicago, Illinois, plaintiff, vs. Central Coal and Coke Company, defendant, and J. M. Bernardin, receiver, the Superintendent for the Five Civilized Tribes for and in behalf of the Choctaw and Chickasaw Nations filed a claim for royalties and rentals due under the terms
126 of said coal mining leases from the Central Coal and Coke Company to the Choctaw and Chickasaw Nations, the total amount of the claims being $4,800.00. Upon the trial of this case it was admitted that $2,800.00 of said claim could not be collected, and the Government contended at this trial that only $2,000.00 of this claim was valid. The trustee for the Central Coal and Coke Company, J. M. Bernardin, filed answer denying that there was anything due under said leases, and setting up that there was due from the said Choctaw and Chickasaw Nations to the Central Coal and Coke Company under said leases, and two other leases from the Choctaw and Chickasaw Nations, a sum greatly in excess of the amount claimed by the Superintendent for the Five Civilized Tribes for and on behalf of the Choctaw and Chickasaw Nations. By stipulation the matter was referred by the Honorable Albert L. Reeves, Judge of the District Court of the United States for the Western District of Missouri, to James H. Gordon as Special Master to make findings of fact and conclusions of law with reference to the claim of the United States and the answer thereto of the Central Coal and Coke Company. The Special Master made findings of fact and conclusions of law finding that there was due to the Choctaw and Chickasaw Tribes for advance royalties the sum of $2,000.00; that the Central Coal and Coke Company had a claim against said sum in the amount of $11,060.90. The Judge of the United States District Court in which the matter was pending approved the findings of fact and conclusions of law as made by the Special Master and entered its judgment decreeing "That the United States in behalf of the Choctaw and Chickasaw Tribes take nothing by virtue of its said claim and that the credit of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90) of the Central Coal and Coke Company be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law." No appeal was taken and said judgment is final. Thereafter the United States of America filed this suit against the United States Fidelity & Guaranty Company, a corporation. The suit seeks to recover against the defendant as the surety of the Central Coal and Coke Company on the bond executed by the defendant at the time the original leases were executed by the Trustees for

the Choctaw and Chickasaw Nations. The defendant United States Fidelity & Guaranty Company pleads the judgment of the United States District Court for the Western District
127 of Missouri, wherein the claim of the Central Coal and Coke Company and the claim of the Choctaw and Chickasaw Nations were litigated. The Government contends that the judgment of the United States District Court for the Western District of Missouri is void and is not a bar to its maintaining this suit. The contention of the Government being that before the United States District Court in Missouri had a right to consider the claim of the Central Coal and Coke Company, or any jurisdiction to render a judgment thereon, the same had to be presented to the General Accounting Office of the United States and disallowed, under the provisions of Section 774, Title 28, U. S. C. A., which reads as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed, in whole or in part, unless it is proved to the satisfaction of the Court that defendant is, at the time of the trial, in possession of vouchers not before in his power to procure and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or by some unavoidable accident."

The defendant contends that the applicable provision of *of* Congress as to its claim is Section 18 of the Act of April 26, 1906 (34 Stat. 137), which is as follows:

"That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: Provided, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

128 "Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

Some point is made in the argument as to the interest of the United States in the proceedings had in the Missouri court, as well as in this court. It may be conceded that in either action the United States is a real party in interest, U. S. v. Minnesota, 270 U. S. 181, and is entitled in its own right to maintain actions for and on behalf of the Indian tribes. However, this does not obscure the real fact that in the Missouri court, as well as in this court, the action is maintained for the benefit of the Indian tribes and any recovery by the plaintiff would be the property of the two tribes. Neither does it obscure the fact that the claim asserted by the Central Coal and Coke Company was essentially a claim against the Choctaw and Chickasaw Tribes of Indians (not against the United States), growing out of its contractual relationship with said tribes of Indians, and the Missouri court in adjudicating this controversy was careful to fix the liability "against the Choctaw and Chic'asaw Tribes," and not against the United States.

The judgment of the Missouri court absolved the principal, Central Coal and Coke Company, of any liability under the coal mining leases to the two tribes. The Government in its brief admits that a valid judgment in favor of the principal absolving it from any liability is a good defense in a suit against the surety.

This suit presents the identical claim against the surety, United States Fidelity & Guaranty Company, in this court that was presented against the principal, Central Coal and Coke Company, in the Missouri court. The same parties by the same attorneys appeared in both courts. Herein the plaintiff seeks to recover against the surety what it failed to recover against the principal in the Missouri court. The question for consideration is whether the judgment relied upon is void.

129 At the outset, in considering the judgment of the Missouri court, it may be stated that this court will reluctantly take the view that the judgment of another court of like jurisdiction is a nullity. Courts do not seek for some ground upon which to set aside the judgment of another court of competent jurisdiction, but rather seek for some theory upon which

it may be sustained. Every presumption is in favor of validity until the contrary appears. Voorhees et al. v. Jackson, 10 Peters 449; 9 L. Ed. 490. Harvey v. Tyler, 69 U. S. 338; 17 L. Ed. 871. United States v. California & Oregon Land Co., 148 U. S. 31; 37 L. Ed. 354. As was stated in Voorhees et al. v. Jackson, supra:

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

Another significant statement is made in Voorhees et al. v. Jackson as follows:

"The distinction between error in judgment and usurpation of power is definite; the one denotes cases where a judgment is reversible by the appellate court, the other where it may be declared a nullity collaterally."

It is fundamental that the three essentials of a valid judgment are, 1st, jurisdiction of the subject matter; 2nd, jurisdiction of the parties; and, 3rd, jurisdiction or power to render the particular judgment. The latter provision does not mean that the judgment rendered must be the one that should have been rendered. The power or jurisdiction to decide carries with it the power or jurisdiction to decide wrong as well as to decide right. For example, had the Missouri court upheld the contention of the United States Government and the two Indian tribes and rendered judgment against the Central Coal and Coke Company for the amount sought, to wit: $4,800.00, and had denied the claim of the Central Coal and Coke Company no one could contend that the judgment of the Missouri court in that event would be void and, although the Government
130 at this time admits that $2,800.00 of its claim is invalid and that it is entitled to judgment for only $2,000.00, no one would contend that the judgment of the Missouri court was void, even to the extent of the $2,800.00 which the Government now admits it is not entitled to recover. This merely illustrates the difference between an error and a nullity.

The remedy to correct an error is by appeal. The record does not reveal why an appeal was not taken from the judgment of the Missouri court. Admit'edly the question now raised could have been raised on appeal. The record of the

proceedings before the Missouri court has not been searched to see if the theory of the Government now urged was presented and urged to the Missouri court. Such a search is not deemed to be necessary. We will presume that a matter of such importance was urged there, and will not consider the effect, on the validity of the judgment in a collateral proceeding, of the failure of the United States to direct the court's attention to provisions of the statute and make a timely objection to the admission of the claim.

The Government does not contend that the Missouri court did not have jurisdiction of the parties and jurisdiction of the subject matter. In fact it argues that Section 774, Title 28, U. S. C. A., gives the court jurisdiction and is the only section of the statute that gives the court jurisdiction of a counterclaim or setoff in an action brought by the United States. Having taken the position that the right of setoff exists by virtue of the statute cited the case of Shillinger v. United States, 155 U. S. 163, cited by the Government, has no application, for the reason that in that case a claim in tort was asserted against the United States in the Court of Claims, and the holding of the Supreme Court was that the statute did not authorize a claim in tort against the United States, and for that reason the court of Claims had no jurisdiction of the subject matter.

Under the terms of Section 774, Title 28, U. S. C. A., an individual sued by the United States, desiring to make a claim for a credit to which he deems himself entitled, is not required to allege compliance with the provisions of said section with regard to admitting the claim in order to confer jurisdiction upon the court to consider the same. United States v. Standard Aircraft Corp., 16 Fed. (2d) 307. The languge of the act is: "No claim for a credit shall be admitted, upon
131 trial, except * * * ", and then follows two conditions under which the claim may be admitted, the first is that it has been presented to the General Accounting office for its examination and disallowed, and second:

"Unless it is proved to the satisfaction of the Court that defendant is, at the time of the trial, in possession of vouchers not before in his power to procure and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or some unavoidable accident." It was stipulated herein that prior to the trial in Missouri the claim had not been presented to the General Accounting Office and disallowed. Nothing was said about the other condition under which the claim might be admitted. If this were the only Act of Congress to be considered this court could, and perhaps

should, indulge the presumption that the Missouri court, before admitting the claim, found that the claimant was excused from presenting the claim and having it disallowed. But we do not believe that the validity of the judgment of the Missouri Court need rest upon this presumption.

The defendant here says that Section 774, Title 28, U. S. C. A., had no application to the claim of the Central Coal and Coke Company in the Missouri court. The Central Coal and Coke Company, permitted to intervene in this action, takes the same position. It is asserted that Section 18 of the Act of Congress of April 26, 1906 (34 Stat. 137), is the applicable statute; that the Act of 1906 is a special act applying with particularity to the controversy before the Missouri court, whereas Section 774, Title 28, U. S. C. A., is general in its terms; that the special act controls over the general act. As a general proposition of law this contention is correct. Cook County Natl. Bank v. U. S., 107 U. S. 445. United States v. Chase, 135 U. S. 255. Townsend v. Little, 109 U. S. 504. State of Missouri v. Ross, 299 U. S. 72. United States v. Mammoth Oil Co., 14 Fed. (2d) (8 C. C. A.) 705. Murrow Indian Orphan Home v. Featherstone, 85 Okla. 150; 204 Pac. 1110. The Act of April 26, 1906, as evidenced by its title is "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." In the case of United States v. Rea-Reed Mill & Elevator Company, 171 Fed. 501, the act was held to apply to suits by the United States on behalf of the Choctaw and
132 Chickasaw Tribes in the District Courts of the United States. From a reading of the act it would appear that provision was being made for just such a proceeding as was had in the Missouri Court. Therein the United States, on behalf of the Choctaw and Chickasaw Tribes of Indians, was seeking "To recover moneys claimed to be due and owing to such tribes." The Central Coal and Coke Company sought to set up and have adjudicated its claim against such tribes. No claim against the United States, within the meaning of Section 774, Title 28, U. S. C. A., was asserted by the Central Coal and Coke Company. If the validity of the judgment of the Missouri court depended upon a determination as to which of the statutes is applicable we would not hesitate to say that the Act of 1906 is the applicable statute.

But it is not deemed necessary to pass upon the correctness of the judgment of the Missouri court. Courts are frequently confronted with the necessity of determining which statute is applicable to proceedings. If, in the Missouri court, the parties made the respective contentions now made, the conclusion is inevitable that the court determined to proceed under the Act of

April 26, 1906. A mere recitation of the contentions of the parties hereto with respect to the two acts of Congress, and their application to the controversy before the Missouri court, clearly shows that the Missouri court in determining which statute was applicable was acting within its jurisdiction and passing upon a matter necessary for its decision. If it be conceded that the Missouri court was in error in its decision it was such an error as did not go to the jurisdiction of the court. As was said in Insley v. United States, 150 U. S. 512:

"The error, if any were committed, did not go to the jurisdiction of the court, but only to the particular remedy pursued, and the action of that court in respect thereto was binding in a collateral proceeding."

The Government admits in this case that its attack upon the judgment of the Missouri court is a collateral attack.

A judgment is not void or subject to collateral attack because it is based on a mistake of law and, although erroneous, it is binding on the parties if not appealed from. Ward v. Coleman, 170 Okla. 201.

It has also been uniformly held that a judgment or decree rendered by a circuit or district court after it has erro-
133 neously refused to remand the case to the state court, from which it had been removed, is not void, but must be given effect by all courts, until reversed by the appellate court. Chesapeake & Ohio R. Co. v. McCabe, 213 U. S. 207. In re Metropolitan Trust Co., 218 U. S. 312. The Metropolitan Trust Company case just cited held that the judgment overruling the motion to remand was merely erroneous and not void. The case of Phebus v. Search (8 C. C. A.) 264 Fed. 407, cited by the Government is not in point, for the reason that in that case the court rendering the judgment had lost jurisdiction of the entire case by reason of a transfer to another court. The law as stated in that case sustains the validity of the Missouri Judgment. It is as follows:

"The test of jurisdiction is the right to decide, not right decision. Judgments of courts, which at the time the judgments were rendered had no jurisdiction to consider or to determine the issues in the respective cases, and whose records at such times disclosed such lack of jurisdiction, are absolutely void, and may be attacked and defeated collaterally. On the other hand, judgments of courts empowered to hear and determine issues relative to the subject-matters and persons to the suits affected by their respective decisions, although such judgments may be illegal and wrong, are simply voidable and are not open to collateral attack."

[File endorsement omitted.]

In United States District Court

Judgment

Filed Sept. 3, 1938

Now on this 3rd day of September 1938, this matter coming on for entry of judgment upon the findings of fact and conclusions of law of the court filed herein on the 27th day of A'gu*s* 1938, and the plaintiff appearing by Charles Champion, Esq., Assistant United States Attorney for the Eastern District of Oklahoma, and W. G. Stigler, Esq., attorney for the Choctaw Tri*v*e of Indians, and the defendant appearing by its attorneys, Messrs. Broaddus and Fite, and the interveners. J. M. Bernardin, Trustee for the Central Coal and Coke Company, and the Central Coal and Coke Corporation, appearing by their attorneys, Messrs. Broaddus and Fite, and the court being duly advised adopts the findings of fact and conclusions of law filed in this cause the same as though fully set forth herein.

134 The court further finds that the judgment rendered in the United States District Court for the Western Division of the Western District of Missouri, is not only a bar to the claim of the plaintiff herein as against the defendant, United States Fidelity and Guaranty Company, but that also under the prayer of the intervening petition of J. M. Bernardin, Trustee for the Central Coal and Coke Company, and the Central Coal and Coke Corporation, that said interveners are entitled to a judgment in the amount of nine thousand sixty dollars ninety cents ($9,060.90) as against the Choctaw and Chickasaw Tribes, together with interest thereupon at the rate of six percent per annum from the 19th day of February 1936, to be secured and collected in the manner provided by law.

It Is, Therefore, Ordered, Adjudged, and Decreed that the plaintiff take nothing in its action against the defendant, United States Fidelity and Guaranty Company, and that the said defendant, United States Fidelity and Guaranty Company, have and recover its costs. To which the plaintiff excepts.

It Is Further Ordered, Adjudged, and Decreed that upon the judgment of the United States District Court for the Western Division of the Western District of Missouri, in cause No. 12287, in said court, J. M. Bernardin, as Trustee of the Central Coal and Coke Company, a corporation, do have and recover of the Choctaw and Ch'ckasaw Tribes the sum of Nine Thousand Sixty Dollars Ninety Cents ($9,060.90) with interest at six percent per annum from the 19th day of February 1936, to be secured and

collected in the manner provided by law. To all of which the plaintiff excepts.

EUGENE RICE,
Judge of the United States District Court for the Eastern District of Oklahoma.

[File endorsement omitted.]

In United States District Court

Petition for appeal

Filed Dec. 1, 1938

Comes now the plaintiff, United States of America, by its undersigned solicitors, and feeling itself aggrieved by the judgment made and enfered in the above styled and numbered cause
135 on the 3rd day of September 1938, does hereby appeal from said judgment of the United States District Court in and for the Eastern District of Oklahoma to the United Circuit Court of Appeals for the Tenth Circuit, having jurisdiction of the appeal in said cause, for the reasons specified in the assignment of errors, which is filed herewith and made a part hereof, and the said plaintiff prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit, sitting at Denver, Colorado; and

Your petitioner desiring to supersede the execution of the judgment herein, prays this court to stay the execution of said judgment in this cause pending said appeal.

CLEON A. SUMMERS,
United States Attorney,
CHARLES N. CHAMPION,
Ass't U. S. Attorney,
W. G. STIGLER,
Choctaw National Attorney,
Attorneys for the Plaintiff, United States of America.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Assignment of errors

Filed Dec. 1, 1938

Comes now the plaintiff, United States of America, by its undersigned solicitors, and assigns the following errors upon which it relies to reverse the judgment made and entered in the above styled and numbered cause on the 3rd day of September 1938:

I

The Court erred in overruling the motion of the plaintiff, United States of America, at the close of the evidence at the trial of said cause for a judgment in its behalf and requested findings of fact and conclusions of law in its favor, which motion should have been sustained for the reason that the evidence was insufficient to justify the rendition of a judgment in favor of the defendants, to which action of the Court in overruling said motion the plaintiff, United States of America, at the time duly excepted and still excepts.

136

II

The Court erred in adopting the findings of fact and conclusions of law filed in said cause on the 27th day of August 1938, for the reason that said findings of fact are not sustained by the evidence, and the conclusions of the Court are contrary to law, to which findings of fact and conclusions of law, as adopted by the Court, the plaintiff, United States of America, excepted and still excepts.

III

The Court erred in finding and concluding as a matter of law that the judgment rendered in the United States District Court for the Western Division of the Western District of Missouri was a valid judgment and a bar to the right of the plaintiff to prosecute its claim herein as against the defendant, United States Fidelity and Guaranty Company, to which action of the Court the plaintiff, United States of America, duly excepted and still excepts.

IV

The Court erred in find' and concluding as a matter of law that the judgment rendered in the United States District Court for the Western Division of the Western District of Missouri is not subject to collateral attack, to which action of the Court the plaintiff, United States of America, duly excepted and still excepts.

V

The Court erred in finding and concluding as a matter of law that the Statute controlling the claim of the defendant, Central Coal and Coke Company, was Section 18 of the Act of April 26, 1906 (34 Stat. 137), to which action of the Court the plaintiff, United States of America, duly excepted and still excepts.

VI

The Court erred in finding and concluding as a matter of law that the claim of the defendant, Central Coal and Coke Company, in the United States District Court for the Western Division of the Western District of Missouri, was not controlled by Section 774, Title 28, U. S. C. A., as contended for by the plaintiff, United States of America, to which action of the Court the plaintiff duly excepted and still excepts.

137

VII

The Court erred in rendering judgment in favor of the defendant and intervener and against the plaintiff on the 3rd day of September 1938, to which action of the Court the plaintiff, United States of America, duly excepted and still excepts.

VIII

The Court erred in rendering its judgment on the 3rd day of September 1938, upon the judgment of the United States District Court for the Western Division of the Western District of Missouri, in Cause No. 12287, wherein it was ordered and adjudged that J. M. Bernardin, as Trustee of the Central Coal & Coke Company, a corporation, have and recover from the Choctaw and Chickasaw Tribes the sum of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90), with interest at six percent per annum from the 19th day of February 1936, for the reason that the judgment of the United States District Court for the Western Division of the Western District of Missouri was wholly void and contrary to the evidence and the law, to which judgment the plaintiff, United States of America, duly excepted and still excepts.

Wherefore, the plaintiff, United States of America, prays that the said judgment, rendered on the 3rd day of September 1938, be reversed, and that the judgment of the United States District Court for the Western Division of the Western District of Missouri be held void and of no force and effect, and that this cause be remanded to the United States District Court for the Eastern District of Oklahoma, and that the plaintiff have such other and further relief to which it may be and appear entitled.

CLEON A. SUMMERS,
United States Attorney,
CHARLES N. CHAMPION,
Assistant United States Attorney,
W. G. STIGLER,
Choctaw National Attorney,
Attorneys for the Plaintiff, United States of America.

[File endorsement omitted.]

In United States District Court

Order allowing appeal

Filed Dec. 1, 1938

Now, on this the 1st day of December 1938, there comes on for hearing in open court a petition of the plaintiff
138 United States of America, for appeal, and said petition having been duly considered, and the Court being fully advised in the premises;

It Is Therefore Ordered Adjudged and Decreed that the petition of the plaintiff be allowed, and that the appeal herein prayed for is this date allowed in open court, and the appeal so allowed shall operate as a supersedeas pending said appeal; the plaintiff, United States of America, not being required to file a supersedeas bond.

EUGENE RICE, *Judge.*

[File endorsement omitted.]

(Citation, dated December 1, 1938, was issued and service thereof accepted by counsel for appellees December 1, 1938.)

In United States District Court

Notice of Appeal to the United States Circuit Court of Appeals for the Tenth Circuit

Filed Dec. 1, 1938

Notice is hereby given that the United States of America, plaintiff named, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on the 3rd day of September 1938, as follows:

(Copy of judgment appears in identical form at page 133 of the printed record and is therefore omitted here.)

Dated December 1st, 1938.

CLEON A. SUMMERS,
United States Attorney, Muskogee, Okla.,
CHARLES N. CHAMPION,
Assistant United States Attorney, Muskogee, Okla.,
W. G. STIGLER,
Choctaw National Attorney, Stigler, Okla.,
Attorneys for the Plaintiff, United States of America.

[File endorsement omitted.]

139 In United States District Court

Statement of points on which the plaintiff and appellant intends to rely in the case on appeal in the United States Circuit Court of Appeals for the Tenth Circuit

Filed Feb. 17, 1939.

Comes now the plaintiff, United States of America, and the appellant on appeal in the United States Circuit Court of Appeals, Tenth Circuit, and states that it intends to rely upon the following statement of points on appeal:

I

The United States District Court for the Eastern District of Oklahoma erred in permitting J. M. Bernardin, Trustee of the Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, to intervene in the above-styled and numbered cause.

II

The United States District Court for the Eastern District of Oklahoma erred in holding that the claims of J. M. Bernardin, Trustee for the Central Coal & Coke Company and the Central Coal & Coke Corporation, a corporation, were available to the United States Fidelity & Guaranty Company for the purpose of defeating the claim of the United States against it.

III

The United States District Court for the Eastern District of Oklahoma erred in entering and rendering its judgment on the 3rd day of September, 1938, upon the judgment of the United States District Court for the Western Division of the Western District of Missouri in cause No. 12287 in that Court, and in giving any effect whatever to that judgment for the reason that said judgment was void for want of jurisdiction of the Court to enter and render it.

IV

The United States District Court for the Eastern District of Oklahoma erred in entering and rendering its judgment on the 3rd day of September 1938, in said cause in favor of
140 the intervener, J. M. Bernardin, Trustee for the Central Coal & Coke Company and the Central Coal & Coke

Corporation, a corporation, upon its claims against the Choctaw and Chickasaw Tribes for the reason that said court had no jurisdiction to entertain the claims of the intervener.

V

The United States District Court for the Eastern District of Oklahoma erred in not entering judgment in favor of the United States of America for the amount of its claim.

VI

The United States District Court for the Eastern District of Oklahoma, in said cause, erred in entering and rendering judgment that the United States Fidelity & Guaranty Company recover its costs, for the reason that the United States is not taxable for the costs.

VII

The United States District Court for the Eastern District of Oklahoma, in said cause, erred in entering and rendering judgment against the Choctaw and Chickasaw Tribes with interest from the date of the judgment of the United States District Court for the Western Division of the Western District of Missouri in cause No. 12287, in that Court, for the reason that the Tribes are not liable for or cannot be taxed with interest.

Dated this 13th day of February 1939.

CLEON A. SUMMERS,
United States Attorney,
By CHARLES N. CHAMPION,
Assistant United States Attorney, Attorneys for plaintiff and appellant, United States of America.

A copy of the above was served upon counsel for the defendant and intervener this 13th day of February 1939.

CHARLES N. CHAMPION,
Assistant U. S. Atty., Atty. for Plaintiff.

[File endorsement omitted.]

141 [Clerk's certificate to foregoing transcript omitted in printing.]

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Order of submission

Twenty-ninth Day, April Term, Thursday, June 22nd, A. D. 1939

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable ROBERT L. WILLIAMS, Circuit Judges

This cause came on to be heard and was argued by counsel. William R. Sherwood, Esquire, appearing for appellant, Bower Broaddus, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

United States Circuit Court of Appeals, Tenth Circuit

No. 1854. September Term, 1939

UNITED STATES OF AMERICA, APPELLANT

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Oklahoma

[September 6, 1939]

William R. Sherwood (Charles E. Collett, Acting Assistant Attorney General, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, Charles W. Leaphart, Special Assistant to the Attorney General, and Thomas Harris were with him on the brief) for Appellant.

Bower Broaddus (Julian B. Fite was with him on the brief) for Appellees.

Before PHILLIPS, BRATTON, and WILLIAMS, Circuit Judges.

BRATTON, Circuit Judge, delivered the opinion of the Court.

The Choctaw and Chickasaw Nations, pursuant to authority conferred by the Act of June 28, 1898, 30 Stat. 495, executed two separate coal and asphalt leases covering certain tribal lands. The United States Fidelity and Guaranty Company became surety on the bond given by the lessee for the faithful performance of its obligations contained in the leases. Central Coal and Coke Company, a corporation organized under the laws of Missouri, acquired the leases by assignment, the surety on the bond consenting thereto. The leases

provided for payment of advance royalties and deficit royalties. Central Coal and Coke Company was placed in equity receivership in the United States Court for Western Missouri; and an ancillary proceeding in receivership was filed in the United States Court for Eastern Oklahoma. The United States, acting through the Superintendent of the Five Civilized Tribes, filed in the ancillary proceeding a claim on behalf of the Choctaw and Chickasaw Nations for $4,890, representing unpaid and delinquent royalties under the leases. By agreement of the United States Attorney for Eastern Oklahoma and the receiver of Central Coal and Coke Company such claim was transferred to the original proceeding in Western Missouri and subsequently treated as though originally filed there. Thereafter that court approved a petition for corporate reorganization of Central Coal and Coke Company under the provisions of section 77B of the National Bankruptcy Act. The trustee in the reorganization proceeding filed an answer and a counterclaim. The counterclaim was for advance royalties paid on the leases in question and two other leases for which it was asserted credit should have been given against subsequent production, and for deficit royalties illegally exacted and paid. The special master to whom the matter was referred heard evidence and reported that the claim of the Government should be allowed in the sum of $2,000, and that the credits asserted by the trustee in the counterclaim should be allowed in the sum of $11,060.90. The court denied exceptions to the report and entered judgment that the United States in behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90 to be secured and collected in the manner provided by law. No appeal was taken from that judgment.

While the claim and counterclaim were pending in Western Missouri, and about three months prior to the time that court rendered its judgment, the United States, in its own behalf and for the Choctaw and Chicasaw Nations, filed this suit in the Eastern District of Oklahoma against United States Fidelity and Guaranty Company as surety on the bond, to recover judgment for the identical royalties involved in such claim. Leave to do so having been obtained, the trustee of Central Coal and Coke Company, and Central Coal and Coke Corporation, which had taken over the assets of Central Coal and Coke Company pursuant to an order of court made in the reorganization proceeding, intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and they also pleaded the judgment rendered in that court. By amended answer, United States Fidelity and Guaranty Company pleaded that the claim and counterclaim had been litigated in Western Missouri, resulting in a judgment in favor of Central Coal and Coke Company on such counterclaim; that Central Coal and Coke Company was insolvent; and that the surety company adopted the allegations contained in the petition in intervention and claimed the

credits fully set forth therein. By answer to the petition in intervention and by reply to the amended answer, the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim.

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; that the judgment rendered there was valid and not subject to collateral attack; that it constituted a bar to the claim of plaintiff; that for such reason judgment should be entered for defendant; and that the interveners were entitled to judgment against the Indian tribes. Judgment was rendered in which it was provided that the United States take nothing; that upon the judgment of the court in Missouri the trustees of Central Coal and Coke Company recover of and from the Choctaw and Chickasaw Tribes the sum of $9,060.90 with interest at six per cent per annum from February 19, 1936, to be secured and collected in the manner provided by law; and that United States Fidelity and Guaranty Company recover its costs. 24 F. Supp. 961. The United States appealed.

The first attack on the judgment in this case is that it was founded on the judgment rendered in the Western District of Missouri; and that the judgment of that court was void for the reason that the court did not have jurisdiction of the subject matter, that is to say of the claim and counterclaim. It may not be amiss to recall at the outset certain well established principles. The United States as guardian of Indian tribes or individual Indians may institute appropriate suits or proceedings for the enforcement of the rights or the protection of the property of its Indian wards. Heckman v. United States, 224 U. S. 413; United States v. Noble, 237 U. S. 74; United States v. Osage County, 251 U. S. 128; La Motte v. United States, 254 U. S. 570; Cramer v. United States, 261 U. S. 219; United States v. Minnesota, 270 U. S. 181; Mars v. McDougal, 40 F. (2d) 247; Tiger v. Twin State Oil Co., 48 F. (2d) 509. The right to maintain suits or proceedings of that character is the necessary complement to its obligations of guardianship. And in such a suit or proceeding it is a real party even though it does not have any pecuniary interest in the final recovery. Heckman v. United States, supra; United States v. New Orleans Pac. Ry. Co., 248 U. S. 507; La Motte v. United States, supra; Cramer v. United States, supra; Tiger v. Twin State Oil Co., supra. In the absence of a controlling statute, the Attorney General of the United States is authorized and empowered to institute, or cause to be instituted, and thereafter to prosecute all suits or proceedings deemed necessary to safeguard or enforce the rights of the United States. United States v. Throckmorton, 98 U. S. 61; United States v. San Jacinto Tin Co., 125 U. S. 273; Causey v. United States, 240 U. S. 399; Mars v. McDougal, supra; Pueblo of Picuris in State of New Mexico v. Abeyta, 50 F. (2d) 12.

It is provided by section 24 (1) of the Judicial Code, 28 U. S. C. A. 41 (1), that the District Courts of the United States shall have jurisdiction of all suits of a civil nature at common law or in equity brought by the United States. An action in personam on a contract is a transitory action, and ordinarily it may be brought where the party against whom relief is sought may be found. The claim of the Choctaw and Chickasaw Nations for delinquent royalties was a transitory action growing out of leases covering lands in Oklahoma, and the United States had power to file it in the ancillary proceeding. It was transferred to the principal receivership proceeding in Missouri, but final action was taken on it in the corporate reorganization proceeding under section 77B of the Bankruptcy Act. That section provides that after approval of the petition for reorganization the court shall have exclusive jurisdiction of the debtor and its property wherever located for the purposes of the section, and shall have and may exercise all the powers not inconsistent with the section which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. It is clear that unless deprived thereof by some special statute, the court in Western Missouri had jurisdiction to consider the claim and to render a binding judgment respecting it. Continental Bank v. Rock Island Ry. Co., 294 U. S. 648; In re Greyling Realty Corporation, 74 F. (2d) 734.

The Atoka Agreement negotiated between the United States and the Choctaw and Chickasaw Nations in April 1897, and ratified by the Act of June 28, 1898, 30 Stat. 495, previously adverted to, is relied upon as vesting exclusive jurisdiction in the United States Court for Eastern Oklahoma of a case or preceeding involving such a claim. That agreement contains a provision that the United States Courts then existing or thereafter created in the Indian Territory should have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the tribes. In determining the intended meaning of the provision, resort may be had to the background against which it was written. A United States Court for the Indian Territory was created in 1889, with exclusive jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as therein defined, not punishable by death or by imprisonment at hard labor; with jurisdiction in civil cases between citizens of the United States who were residents of the Indian Territory, or between citizens of the United States, or of any state or territory therein, and any citizen of or person residing or found in the Indian Territory, when the amount in controversy was one hundred dollars or more; but without jurisdiction over controversies between persons of Indian blood. The court was vested with jurisdiction over controversies arising out of coal mining leases or contracts executed by any of the tribes where the amount involved exceeded the sum of one hundred dollars, 25 Stat. 783. The jurisdiction of the court was enlarged in 1890, 26 Stat. 81. The territory was divided into three

separate districts and the jurisdiction of the courts somewhat enlarged in 1895, 28 Stat. 693. The appointment of an additional judge was authorized in 1897, 30 Stat. 62, 84. For many years prior to the execution of the Atoka Agreement, the Choctaw and Chickasaw Nations each had a system of tribal government, including tribal courts vested with jurisdiction to decide controversies arising among members of the tribe. In 1893, Congress authorized the appointment of the so-called Dawes Commission, 27 Stat. 612, 645; and the commission stated in a report made in 1895 that all branches of the governments in the territory were wholly corrupt, irresponsible, and unworthy to be longer entrusted with the care and control of the money and other property of the Indian citizens, much less their lives, and recommended that such governments be abolished. Construed in the light of this factual background, the provision in question indicates clearly and convincingly that it has reference to local actions in respect of titles, ownership, and occupation of lands, coal, and asphalt, not to transitory actions which are personal in character; and that the primary purpose was to divest the tribal courts of jurisdiction in such actions. Neither the language, the history leading up to the negotiation of the agreement, nor the act of ratification, is persuasive that the provision was intended as a grant of jurisdiction to the United States Courts in the Indian Territory or their successor in jurisdiction [1] of transitory actions so as to deprive other United States courts of the jurisdiction which they otherwise would possess.

Section 18 of the Act of April 26, 1906, 34 Stat. 137, 144, is also relied upon as vesting exclusive jurisdiction in the United States Court for Eastern Oklahoma of a cause or controversy arising out of the leases in question. That statute authorizes the Secretary of the Interior to bring suit in the name of the United States for the use of the Five Civilized Tribes to collect moneys or to recover lands claimed by them; it provides that when such a suit is filed to recover moneys due and owing the tribe, the defendant shall have the right to set up and have adjudicated any claim it may have against such tribe; and it further provides that the United States Courts in Indian Territory are given jurisdiction to try and determine such suits. It is to be observed that the statute fails to provide in express language that such courts shall have exclusive jurisdiction. The mere grant of jurisdiction to one court, without more, does not imply that the jurisdiction is to be exclusive. United States v. Bank of New York & Trust Co., 296 U. S. 463. It is to be presumed that had Congress intended to vest exclusive jurisdiction of such controversies in the United States Courts in the Indian Territory it would have used apt words to indicate such purpose. In the absence of such an indication of purpose, the act cannot be construed to deprive the court in Western Missouri of the jurisdiction it otherwise had. It follows that the judgment of that court was

[1] The United States Court for Eastern Oklahoma succeeded to the jurisdiction of the United States Courts in the Indian Territory. See United States v. Rea-Read Mill & Elevator Co., 171 F. 501, 512.

not subject to collateral attack for want of jurisdiction of the subject matter.

It is contended that even though the Act of 1906, supra, did not deprive the court in Western Missouri of jurisdiction of the subject matter of the proceeding, it conferred no jurisdiction on that court to render an affirmative judgment. The argument is that due to their immunity from civil suit, recoupment could not be had against the United States or the Indian Nations unless expressly authorized and that no such authority had been granted. A direct suit cannot be brought against a sovereign in the absence of its consent. But where the United States voluntarily comes into court as a private suitor, it waives its immunity and becomes a litigant for all purposes except in respect to affirmative relief against it beyond the matters in controversy, and costs. An amount due the opposite party arising out of the same transaction may be pleaded by way of recoupment and credit in an action brought by the United States. United States v. MacDaniel, 7 Pet. 1; United States v. Ringgold, 8 Pet. 150; Bull v. United States, 295 U. S. 247.

The Choctaw and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized. Turner v. United States, 248 U. S. 354; Thebo v. Choctaw Tribe of Indians, 66 F. 372; Adams v. Murphy, 165 F. 304. But there is no need to determine whether the court in Western Missouri had jurisdiction to render an affirmative judgment against the Indian Nations for any amount on the counterclaim. The court had jurisdiction to judicially determine the credits on the counterclaim to which Central Coal and Coke Company was entitled in connection with the transaction out of which the claim grew, and to apply enough thereof to offset the claim. De Groot v. United States, 5 Wall. 419, 431. The judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim, applied sufficient of that due on the counterclaim to offset in full the claim, and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law. The effect of the judgment was that the United States take nothing and that Central Coal and Coke Company go hence without day. Reeside v. Walker, 11 How. 272; Lee v. Kaufman, 3 Hughes 36, 15 Fed. Cas. 8191. Such a judgment rendered in a cause or proceeding which the sovereign voluntarily initiated is not open to the objection that it violates the doctrine of immunity. And since the court in Western Missouri had jurisdiction to render such a judgment upon casting up the charges and credits, the court in Oklahoma was bound by it in this later action involving the same controversy.

The further contention advanced is that the court below should have restricted the intervention to purposes of defense; that it was error to allow the interveners to come into the case for the purpose of litigating a counterclaim for affirmative relief. The intervention was allowed, and the judgment was rendered before the New Rules of Federal Procedure became effective. Equity Rule 37 therefore has

application. That rule provides that anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention but the intervention shall be in subordination to, and in recognition of, the propriety of the main action. The rule is no warrant for an intervener to come into a suit for the purpose of having adjudicated some controversy solely between it and the plaintiff which is entirely independent of the controversy between plaintiff and defendant. In other words, an intervener cannot enter a case for the avowed purpose of enlarging the scope of the litigation to the extent of injecting into it wholly new and independent issues. Chandler Co. v. Brandtjen, Inc., 296 U. S. 53. But no such situation is presented here. The petition in intervention tendered only issues growing out of the original transaction on which the suit was founded. No new and independent controversy not arising out of the transaction in suit was presented. Furthermore, no objection was made to the filing of the petition in intervention, and therefore the interveners should be treated for all intents and purposes as though they had been made parties defendant and had set up their matters in defense by way of counterclaim. French v. Gapen, 105 U. S. 509. It certainly cannot be contended that the matters pleaded in the intervention would be vulnerable to objection on the ground of injecting foreign issues into the cause if the interveners had been joined as parties defendant and had pleaded them by answer and counterclaim.

The remaining contentions which merit discussion are that the court erred in awarding interest against the Indian tribes and in awarding costs against the United States. Repeating, the Indian tribes, like the United States, are sovereigns immune from civil suit except when expressly authorized. Turner v. United States, supra; Thebo v. Choctaw Tribe of Indians, supra; Adams v. Murphy, supra. It is a well-settled rule that the United States is not liable for interest unless the liability is created by statute or assumed by authorized contract. United States v. Sherman, 98 U. S. 565; Angarica v. Bayard, 127 U. S. 251; United States v. Worley, 281 U. S. 339; Reed v. Howbert, 77 F. (2d) 227. That rule applies to the Indian tribes. The award of interest on the amount by which the counterclaim exceeded the claim does not find its genesis in any statute or contract executed with authority of law. It is well settled that the United States is not liable for costs except when authorized by statute. Stanley v. Schwalby, 162 U. S. 255; United States v. Chemical Foundation, 272 U. S. 1; United States v. Worley, supra.

The judgment is modified by striking out the respective provisions awarding interest and costs, and as modified it is affirmed.

A true copy.

Attest:

Clerk, U. S. Circuit Court of Appeals,
Tenth Circuit.

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Judgment

Second Day, September Term, Wednesday, September 6th, A. D. 1939.

Before Honorable ROBERT E. LEWIS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby modified by striking out the respective provisions awarding interest and costs, and as so modified the judgment of the said district court is affirmed.

Application of appellant for extension of time within which to file petition for rehearing

Comes now the United States of America, appellant in the above styled and numbered cause, by and through its undersigned solicitors of record, and respectfully moves this Honorable Court to grant it an extension of time within which to file a petition for rehearing, and says:

That the opinion and judgment of this court, in said cause, was rendered and filed on September 6, 1939; that thereafter the clerk of this court, pursuant to the rules of the court, made printed copies of the opinion of the court for use of counsel for the respective parties; that printed copies of the opinion of the court, in said cause, were not received by the Attorney General of the United States until September 25, 1939; that the Attorney General of the United States is now considering the advisability of filing a petition for rehearing, pursuant to rule 23 of the rules of this court; that rule 23 of this court provides that a petition for rehearing may be presented and filed within thirty (30) days after the date of judgment or decree, and by reason of the fact that the Attorney General of the United States did not receive printed copies of the opinion and judgment of this court until September 25, 1939, sufficient time will not be permitted to properly consider and file a petition for rehearing within the time allowed by the rule of this court; that the Attorney General of the United States, by reason thereof, desires that additional time be granted, in order that proper consideration may be given to the case for the purpose of determining whether a petition for rehearing should be filed.

Wherefore, the applicant prays this Honorable Court that the appellant, United States of America, be granted an extension of thirty (30) days within which to file a petition for rehearing.

CLEON A. SUMMERS,
United States Attorney,
CHARLES N. CHAMPION,
Assistant United States Attorney,
Attorneys for Appellant United States of America.

Filed Oct. 2, 1939. Albert Trego, Clerk.

Order extending time to file petition for rehearing

Twelfth Day, September Term, Monday, October 2nd, A. D. 1939

Before Honorable ROBERT E. LEWIS and Honorable ORIE L. PHILLIPS, Circuit Judges

This cause came on to be heard on the application of appellant for an extension of the time within which appellant's petition for rehearing may be filed herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said application be and the same is hereby granted and that the time within which twenty printed copies of appellant's petition for rehearing may be filed in this cause be and the same is hereby extended to and including the sixth day of November 1939.

Order denying petition for rehearing

Twenty-eighth Day, September Term, Wednesday, November 8th, A. D. 1939

Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

Motion of appellant for stay of mandate

Comes now the appellant, United States of America, in the above styled and numbered cause, by its undersigned solicitors and files herein its motion for an order of this court staying the mandate of this court and says:

That on the 6th day of September 1939 this honorable court filed in said cause its opinion affirming the judgment of the United States District Court for the Eastern District of Oklahoma, except the provisions of said judgment awarding interest and cost; thereafter and within the time allowed by the rules of this court, the appellant filed its petition for rehearing and brief in support thereof; on November 8, 1939, this honorable court denied appellant's petition for rehearing.

Appellant represents that the Attorney General of the United States is now considering filing a petition or application to the Supreme Court of the United States for certiorari and by reason thereof the mandate of this court should be stayed for a period of thirty (30) days pending the determination by the Attorney General and the filing of an application to the Supreme Court of the United States for certiorari.

Wherefore the appellant prays that this honorable court grant this motion and enter its order staying the issuance of the mandate in this case for a period of thirty (30) days pending the filing of an application to the Supreme Court of the United States for certiorari.

CLEON A. SUMMERS,
United States Attorney,
By CHARLES N. CHAMPION,
Assistant United States Attorney,
Attorneys for the Appellant, United States of America.

Filed Nov. 18, 1939. Albert Trego, Clerk.

Order staying mandate

Thirty-third Day, September Term, Saturday, November 18th, A. D. 1939

Before Honorable ROBERT E. LEWIS and Honorable ORIE L. PHILLIPS, Circuit Judges

This cause came on to be heard on the motion of appellant for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit.

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 1854, wherein United States of America was appellant and United States Fidelity and Guaranty Company, a corporation, et al. were appellees, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 27th day of November, A. D. 1939.

[SEAL]

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals,
Tenth Circuit.

By GEORGE A. PEASE,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed January 8, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 43976. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 569. The United States of America, Petitioner vs. United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed December 5, 1939. Term No. 569 O. T. 1939.

20433—40——9

U. S. GOVERNMENT PRINTING OFFICE: 1940

STIPULATION AND ADDITION TO TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 569

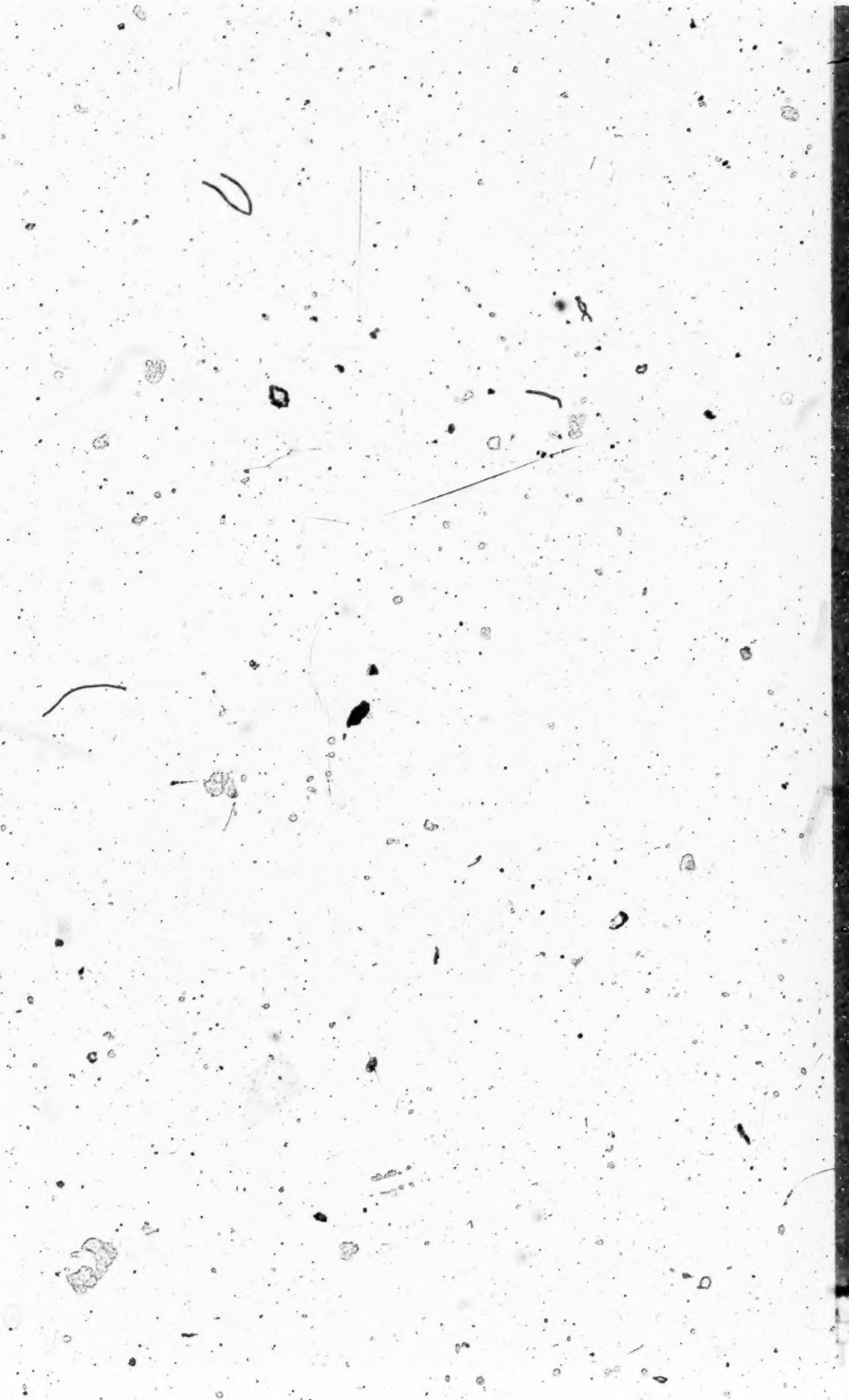
THE UNITED STATES OF AMERICA, PETITIONER

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, J. M. BERNARDIN, TRUSTEE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 5, 1939
CERTIORARI GRANTED JANUARY 8, 1940



SUPREME COURT OF THE UNITED STATES

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No. 569

THE UNITED STATES OF AMERICA, PETITIONER

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INDEX

	Original	Print
Stipulation for addition to record	1	1
Transcript of proceedings before Hon. Eugene Rice in United States District Court, Eastern District of Oklahoma, Nov. 23, 1937	2	1
Petition of United States for rehearing in United States Circuit Court of Appeals and brief in support thereof	19	8

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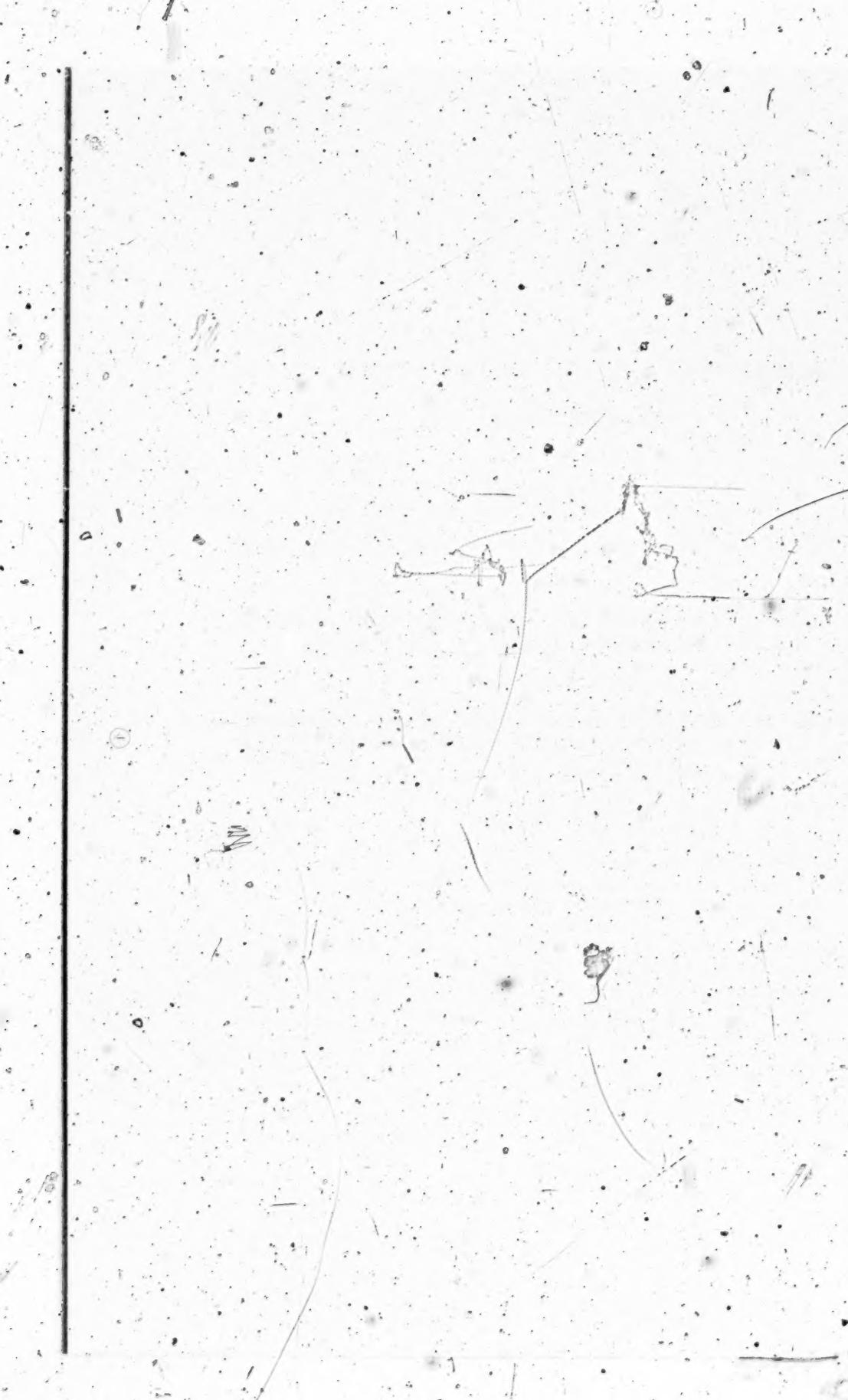

1 In Supreme Court of the United States

Petitioner No. 569

UNITED STATES OF AMERICA

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, RESPONDENTS

Stipulation

On this the 16th day of February 1940, it is stipulated by the petitioner and respondents that the attached certified copy of the transcript of the proceedings before the Honorable Eugene Rice, of the United States District Court for the Eastern District of Oklahoma, on November 23, 1937, as filed in cause No. 6451 Law, entitled United States of America versus United States Fidelity and Guaranty Company et al., and certified copy of the petition for rehearing filed in the United States Circuit Court of Appeals for the Tenth Circuit, in cause No. 1854, entitled United States of America, appellant, versus United States Fidelity and Guaranty Company et al., appellees, on November 3, 1939, shall be an addition to the record heretofore printed and filed in this case.

FRANCIS BIDDLE,
Solicitor General of The United States.

BOWER BROADDUS,
Attorney for the respondents, United States Fidelity and Guaranty Company, a corporation; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and The Central Coal and Coke Corporation, a corporation.

2 In District Court of the United States for the Eastern District of Oklahoma

No. 6451 Law

UNITED STATES OF AMERICA, PLAINTIFF

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, DEFENDANT

Record of proceedings had in the above entitled cause at Muskogee, Oklahoma, November 23, 1937, before Honorable Eugene Rice, United States District Judge.

Appearances: For the United States: Charles N. Champion, Assist. Dist. Atty; C. W. Miller, Assist. Dist. Atty. For the Choctaw Nation: W. G. Stigler, Esq. For United States Fidelity & Guaranty Co.: Broaddus & Fite.

Mr. CHAMPION. If the court please, we have entered into stipulation for most of the facts in this case. I make this brief statement as to the case. The Government brings this action against the United States Fidelity & Guaranty Company as surety upon a bond, or surety rather for a principal in a bond executed by the original lessee, who was
3 the Kansas-Texas Coal Company, I believe it is, indemnifying the fulfillment of the provisions of a coal mining lease or tribal coal mining lease executed by the Trustees and Chiefs of the Chickasaw and Choctaw Tribes or Nations of Indians in favor of the Kansas-Texas Coal Company. The property involved in this case is a part of the segregated coal lands of the Choctaw and Chickasaw Nations. There were two leases, lease No. 1 covering certain property and Lease No. 2. The leases were executed pursuant to the provisions of the Act of Congress of June 28, 1898, and the authority set out in Section 29 of that act and the rules and regulations of the Secretary of the Interior relative to the leasing of these segregated coal lands of the Choctaw and Chickasaw Tribes for developing or mining coal. The leases, as I said, were executed by the Trustee of the Choctaw Tribe and the Trustee of the Chickasaw Tribe and approved by the Secretary of the Interior on the 13th day of June 1902. The lease was for a term of thirty years. The surety company the United States Fidelity & Guaranty Company, the defendant in this action, as a part of the execution of that lease executed a bond for the sum, or in the sum of $75,000.00 payable to the plaintiff, the United States of America, and conditioned, as I stated, upon the principal fulfilling and carrying out and observing all of the obligations assumed under the terms of this coal mining lease. The claim of the Government in this case is for royalties, advance royalties, under the provisions of that lease
4 for the years 1930 and 1931. The Government also has a claim for deficit royalties in the sum of $2,800.00. I will state frankly at this time that the Government is not insisting upon its claim for deficit royalties, in view of the more recent decisions of the Circuit Court of Appeals for this circuit. The claim of the Government for the advance royalties in the sum of $2,000 under both of these leases was originally presented to the trustee—I might say this to begin with. The Central Coal & Coke Company afterwards acquired by assignment the rights under the terms of this coal mining lease. As I stated a moment ago, the original lessee was the Kansas-Texas Coal Company. They assigned to the Central Coal & Coke Company their rights under the lease. Subsequently thereto the Central Coal & Coke Company assigned to the Central Coal & Lumber Company, and thereafter by assignment the Central Lumber & Coal Company reassigned back to the Central Coal & Coke Company. We have stipulated so far as this controversy is concerned it may be considered that the Central Coal & Coke Company was at all times in possession of the lease, and for the purposes of this suit they may be considered as though they were the original lessee. The Central Coal & Coke Company filed a proceeding in the District Court of the United States in the Western Division of

Missouri for a reorganization under the provisions of the amendment to the Bankruptcy Act. An ancillary proceeding to that proceeding in Missouri was pending here in this district. The Government filed its claim for advance royalties and for deficit royalties in this ancillary proceeding pending in this district. By agreement of all parties it was agreed that the Government's claim would be considered likewise filed in the Western District of Missouri in that case, which was the original proceeding. In that proceeding in Missouri the claim of the Government against the Central Coal & Coke Company, as well as the claim of the Central Coal & Coke Company in the nature of a counterclaim or setoff against the Government was referred to a Special Master, Mr. James Gordon, in this city. A hearing was had before Mr. Gordon upon the Government's claim and counterclaim and setoff of the Central Coal & Coke Company, and findings were made by Mr. Gordon, and those findings were filed in the action. Objections were made thereto by the Government, and the Federal District Court in Missouri later approved the findings of the Special Master and rendered a judgment. The counterclaim or setoff of the Central Coal & Coke Company was for the sum of $11,090.00 and some odd cents. The Government's claim being $2,000.00. The Special Master allowed the Government's claim in the sum of $2,000. He also allowed the counterclaim of the Central Coal & Coke Company in the sum of $11,090.00 and some odd cents, which left an offset against the Government for nine thousand and some odd dollars. The judgment rendered by the District Court in Missouri approving the findings of the Special Master recited that the claim of the Government was allowed in the sum of $2,000.00; that the counterclaim and setoff of the Central Coal & Coke Company was allowed in the sum of $11,000, and then the court rendered judgment against the Government on that counterclaim for the balance of the nine thousand and some odd dollars, which was the difference between the Central Coal & Coke Company's claim and the Government's claim which was allowed. As I stated a moment ago, we have stipulated all those facts. The evidence which was introduced before the Special Master and the proceedings before him to sustain the Government's claim, as well as the counterclaim of the Central Coal & Coke Company, that evidence it has been agreed between the parties in this case would be submitted to this court and received by this court as the evidence in this case, because the evidence would be the same if we reintroduced it. The pleadings in that case in the Western District of Missouri, as well as the judgment, are all attached here and agreed upon by the parties. There is one exception here as to the stipulation. We have not stipulated the terms and conditions of the bond in this case. It so happens when I filed the original suit I did not have a copy of that bond. I learned later it had been lost, and I have since been able to obtain a copy. The rules and regulations of the Secretary of the Interior prescribe the form of the bond which was necessary to be executed in matters of this kind by the principal for the fulfillment

of the provisions and terms of the lease, and if there is no objection I would like to *to* stipulate what the conditions of this bond was.

Mr. BROADDUS. I have the form of the bond and it will be
7 agreeable to the defendant in this case and intervener to say that that form was used and executed by the principal and it with the blanks filled out made the conditions of these leases in the sum of $75,000, if that is satisfactory.

Mr. CHAMPION. Yes, sir. We would like to offer this as a form of the bond. (Government's Exhibit #1.)

Mr. BROADDUS. I would like to offer a certified copy of the order authorizing the trustees to intervene in this case. (Defendant's Exhibit #1.)

Mr. CHAMPION. It is the contention of the Government in this case that the judgment rendered by the District Court, Western Division of the Western District of Missouri is void. We say that that court was without authority, without jurisdiction to render that judgment. And mind you that that judgment, as I stated a moment ago, allows a counterclaim or set-off in favor of the Central Coal & Coke Company against the Government. It is our contention that the reason that the court had no jurisdiction and was without authority to render that judgment was because the record in that case—the record includes the proceedings and all evidence that was introduced both before the Special Master and the court—the record as I say does not show in any way, fails to show that a claim was presented by the Central Coal & Coke Company to the General Accounting Office of the United States and by that department disallowed, and for that reason under a statute of the United States it is our contention that that court was without jurisdiction to render that judgment. The judgment itself is void. The court had no authority in other words to render a judgment against the United States on a counterclaim.

The COURT. How about jurisdiction to deny the claim for $2,000?

Mr. CHAMPION. It had jurisdiction I think to do that. But in allowing our claim for $2,000 the court rendered judgment but it allowed the counterclaim of the Central Coal and Coke Company for $11,000 and rendered judgment against the Government for the difference for nine thousand and some odd dollars. We say that the judgment of that court in favor of the Central Coal & Coke Company on its counterclaim for the full amount is void, and that the court had no authority to render that. I think the facts will simmer down to this, if the court holds that that judgment as entered is a valid judgment that is the end of the law suit, because they plead that judgment. The surety in this case and the intervener, which succeeded the Central Coal & Coke Company, plead that judgment as a bar to the right by us to recover in this action against the surety. If the court holds that judgment is valid that is the end of the law suit. On the other hand, if the court holds the judgment is void then we think we are entitled to recover against the surety for the sum of $2,000. This further point. After that judgment had been rendered by the Federal Court

in Missouri the trustee of the Central Coal & Coke Company, or rather the successor of the Central Coal & Coke Company which is known as the Central Coal & Coke Corporation, its trustee filed with
9 the General Accounting Office a claim, the very claim that the Central Coal & Coke Company presented in that proceeding. That was after that judgment had been rendered. The General Accounting Office disallowed their claim. That is plead in this action and it has been stipulated for the purpose of argument that they did present their claim after the judgment, eight or ten months after the judgment had been rendered in Missouri. It is our contention that the fact that they afterwards presented their claim that that is of no avail to them in this suit because they are relying entirely upon that judgment. We say by reason of the fact that they didn't present their claim before that judgment was rendered that that judgment is void. At this time we would like to object, and we have reserved in the stipulation the right to object, to the relevancy of that testimony. At this time the government does object to the evidence as to the presentation of the counterclaim by the Central Coal & Coke Corporation, successor to the Central Coal & Coke Company, to the General Accounting Office, for the reason that it is incompetent, irrelevant, and immaterial, and bears upon no issue in this case.

The COURT. That was presented after the judgment.

Mr. CHAMPION. After the judgment; yes, sir.

Mr. BROADDUS. Right there, your honor, I want to *to* say that is not offered for the purpose of affecting that prior judgment. After they raised the question of validity that claim was filed. It is offered for this purpose; we contend of course first the statute relied
10 upon has no application and the judgment is valid. But if it isn't valid we then have made a premise for judgment here upon the same thing we had up there. If your honor holds the judgment is valid there is no need of going into that.

Mr. CHAMPION. Of course it is our contention in the event the court holds this judgment is void, since this is a suit solely against the surety, that they are not entitled to proceed in this case for judgment upon their counterclaim. That neither the surety nor the intervener prays for judgment upon its counterclaim, but solely relies upon the validity of the judgment of the District Court of Missouri and pleads that judgment as a bar.

The COURT. It will be admitted to be considered upon the entire case. I will let it be admitted.

Mr. CHAMPION. Now, if the court please, with that brief statement I would like for the court to consider this judgment. That is a certified copy of the judgment rendered in the District Court of Missouri.

Mr. BROADDUS. I think he has covered the facts with the exception of one thing. My contention is this, your honor, that this suit is covered by special act of Congress authorizing suit by the Choctaw-Chickasaw Tribe for the allowing of counterclaims; that this is not a

claim against the Government under the statute upon which he relies, but is a claim against the Choctaw and Chickasaw Tribe. It is not an action by the Government for the Government under which the Government has any pecuniary interest whatsoever. The purpose
11 of the statute upon which he relies is to protect the government and is limited to the government. But this suit is brought under authorization of the Secretary of the Interior under Act of Congress authorizing the Secretary of the Interior to bring suit in the name of the United States and to wind up the affairs and recover judgment in behalf of the tribe. That same act provides counterclaims of the defendant may be heard in that action. And so I say this statute has no application and I think is clearly shown by the authorities. With reference to the other position of counsel the direct evidence is all here. If this was a matter of original hearing your honor would still have jurisdiction to determine which party should prevail and fix the amount. We have the same evidence here and it may be used. I might say in passing, Judge Gordon was perhaps the best informed man on royalties and coal in this section of the country. He formerly lived at McAlester and died just a short while back. Both he and Judge Reeves stated that under these facts which are before your honor we were entitled to the offset. Now he says the interveners have set up that judgment. They have also set up in their intervention, and also the surety company, that those facts are the facts in defense of this claim without regard to the judgment. And the surety company has gone one step further and stipulated that the intervener in this case is insolvent and, therefore, we have no remedy and under the Tenth Circuit Court without the intervener being in here the surety would have the right to raise the question.

12 The COURT. You contend the action of the United States Government is for and on behalf of the tribe?

Mr. BRAADDUS. They show that in their petition.

Mr. BROADDUS. They show that in their petition.

Mr. CHAMPION. We make this contention of course that the money which we claim as due was due the United States, and that the United States in prosecuting this claim did so in its governmental function and by virtue of the enforcement of the business policy established for the benefit of the Choctaw and Chickasaw Tribes of Indians; and that the members of the tribes themselves are not the real parties in interest, but that the Government has a pecuniary interest by virtue of its guardianship over the tribe for whom it brings this action. I have authorities here on that.

The COURT. Let me ask you this question. You have probably covered it. The judgment you complain about was entered in the Western Division of the Western District of Missouri in the bankruptcy proceeding of the Central Coal & Coke Company, a corporation?

Mr. CHAMPION. Yes, sir; that is correct.

The COURT. You filed a claim for $2,000?

Mr. CHAMPION. Filed originally $4,000, two thousand dollars of which was allowed as advanced royalties.

The COURT. You filed your claim in that proceeding?

Mr. CHAMPION. Yes, sir. Then the Central Coal & Coke Company filed its answer and set up its counterclaim against the government and the tribe for $11,090.

13 The COURT. You claim their counterclaim was void?

Mr. CHAMPION. We claim that the court had no authority or jurisdiction to render judgment against the government upon their counterclaim.

The COURT. Did they have authority to consider the counterclaim to the extent it would defeat your claim?

Mr. CHAMPION. No, sir; we say the court had no authority or jurisdiction to do that.

The COURT. In other words you say allowing your claim is valid but allowing their counterclaim is void.

Mr. CHAMPION. As against the Government; yes, sir.

The COURT. And you now have a valid claim.

Mr. CHAMPION. Yes, sir. However, we are suing the surety for the $2,000 royalty. That is the amount we claim. We sued for $4,800.00, but as I stated we are not insisting on the claim for deficit royalties in the sum of $2,800.00. This suit here is solely a suit against the surety. The principal was in bankruptcy at the time this action was filed and since this suit was filed the successor of the Central Coal & Coke Company, by permission of court, has intervened in this action.

Mr. BROADDUS. You are mistaken about that. The trustee of the Central Coal & Coke Company appears here as the original party to that suit, and also the reorganized company, so if there is any interest outstanding they are both here.

Mr. CHAMBION. They have appeared as intervener. In our

14 answer we pray that their intervening petition be dismissed, for the reason they don't set up facts sufficient to constitute a cause of action against the plaintiff in this case; and for the further reason that the record in the bankruptcy case in Missouri is apparent on its face that court had no jurisdiction to render that judgment. They can't come in this action and set that action up as a bar to the right of the Government to recover in this case. That is purely a question of law. This further statement, in answer to counsel's statement with reference to the evidence and the records and proceedings, which we have agreed upon and stipulated in this case. That is the record and proceedings before the Special Master in the bankruptcy case in Missouri. We contend that that evidence and those proceedings and the record in that case is considered in this case for the purpose of showing that nowhere in that record, nowhere in that proceeding, will it appear that the Central Coal & Coke Company ever presented its claim to the General Accounting Office and any action was taken.

Mr. BROADDUS. We admit that they did not. We say they didn't have to.

(Argument was then heard by the court.)

15 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss.

I, Chas. T. Diffendaffer, Official Stenographer within and for the Eastern District of Oklahoma, hereby certify that I reported in shorthand the proceedings had at the trial of the above-entitled cause; that the above and foregoing is a full, true, and correct transcript of my stenographic notes; that the above and foregoing is all the proceedings reported by me and that the balance of the record was introduced by written stipulation of the parties.

Feb. 12, 1940.

(Signed) CHAS. T. DIFFENDAFFER,
Official Stenographer.

[Clerk's certificate to foregoing paper omitted in printing.]

17 [File endorsement omitted.]

19 In United States Circuit Court of Appeals for the Tenth Circuit

No. 1854

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Oklahoma

Petition of the United States for rehearing and brief in support thereof

Petition for rehearing

Filed Nov. 3, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Comes now the United States of America, appellant in the above-entitled cause, and presents this petition for a rehearing on two ques-

tions: (1) whether the action of the District Court for the Western District of Missouri in fixing the balance due on the counterclaim at $9,060.90 was binding on the court below; and (2) whether the court below had jurisdiction to render an affirmative judgment in favor of the interveners.

20 In the opinion already rendered this Court has held that the United States is a "real party" whenever it brings suit to protect the rights of its Indian wards; that "the Choctaw and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized"; that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indians Nations because no such judgment was rendered; that "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim, applied sufficient of that due on the counterclaim to offset in full the claim, and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and that "the effect of the judgment was that the United States take nothing and that Central Coal and Coke Company go hence without day." With these holdings the Government has no quarrel. But in concluding that the foregoing balance could not be reexamined in a court possessing jurisdiction to render moneyed judgments against the Choctaw and Chickasaw Nations,[1] this Court inadvertently failed to recognize the full import of certain precedents:

"1. The Court did not recognize the full import of United States v. Eckford, 6 Wall. 484 (1867), wherein a judgment of the Court of Claims giving conclusive effect to a similar 'adjudication' was reversed by the United States Supreme Court.

"2. The decision of the Court of Claims in Adams v. United States, 3 C. Cls. 312 (1868), is in direct conflict with the decision in the instant case."

21 In its original brief the Government relied upon the well-recognized doctrine that no affirmative judgment could be rendered against a sovereign without its consent. Since the court in Missouri had no jurisdiction to render an affirmative judgment (and, as this Court found, did not in fact render such a judgment), it was believed unnecessary to cite authorities for the proposition that the court's finding as to the balance due could not have the force of a judgment. But inasmuch as this Court has given to that finding the same sanctity as a judgment, in an opinion in which the foregoing authorities were not analyzed, the petitioner respectfully requests that a rehearing be granted.

It is also believed that the question of whether the Act of 1906 conferred jurisdiction on the court in Oklahoma to render an affirmative judgment in favor of the interveners should be further examined in the light of its legislative history.

[1] See section 18 of the Act of April 26, 1906, 34 Stat. 137, 144, which is set out in the Appendix.

Wherefore, for the foregoing reasons, and because of the importance of this decision as a precedent in cross suits against the United States, the petitioner requests that a rehearing be granted.

Respectfully,

NORMAN M. LITTELL,
Assistant Attorney General,
C. R. DENNY,
VERNON L. WILKINSON,
Attorneys,
Department of Justice, Washington, D. C.

CERTIFICATE OF COUNSEL

I, Vernon L. Wilkinson, counsel for the appellant in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

VERNON L. WILKINSON.

22 *Brief in support of petition*

STATEMENT

In order that the relevancy of the decisions cited in support of this petition may be fully appreciated, the facts of the instant litigation are summarized: Acting on behalf of the Choctaw and Chickasaw Nations, the United States in 1931 filed in the District Court for the Western District of Missouri a claim against the receiver of the Central Coal and Coke Company for advance and deficit royalties totaling $4,800 (R. 34–35). In 1935 the trustee, appointed pursuant to Section 77B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26–28, 36–42). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim of $11,060.90 (R. 56–66). The court denied exceptions to the report and entered judgment that the United States in behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner provided by law (R. 66–67). No appeal was taken from that judgment.

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf and for the Choctaw and Chickasaw Nations filed suit in the court below against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties

23 (R. 11–16). Leave to do so having been obtained (R. 29), the Central Coal and Coke Corporation (successor to the Central Coal and Coke Company) intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and they also pleaded the judgment rendered in that court (R. 24–26).

The surety company by amended answer adopted the allegations contained in the petition in intervention (R. 16–18). By way of answer and reply, the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim (R. 18–22).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; that the judgment rendered therein was valid and not subject to collateral attack; that it constituted a bar to the claim of the plaintiff; that for such reason judgment should be entered for the surety company; and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90 (R. 119–134).

ARGUMENT

I

For purposes of this petition it is conceded that the District Court for the Western District of Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; and that its judgment that the United States take nothing constituted a bar to any subsequent claims for the said royalties. But the Government does contend that the court in Western Missouri had no jurisdiction
24 to render an affirmative judgment against the United States or the Indian Nations; that no such judgment was in fact rendered (and this Court has so held); that any "determination" or "ascertainment" of the balance due was not binding on the court in Oklahoma (a court possessing special jurisdiction to render moneyed judgments against the United States), and that it was therefore error not to reexamine the counterclaim on its merits. This Court, in concluding that the balance "fixed" by the court in Missouri was binding in subsequent proceedings in Oklahoma, inadvertently failed to consider two cases which are directly in point, and which were not analyzed in the original brief because it was not anticipated that the decision would turn on the point now under discussion.

1. The Court did not recognize the full import of United States v. Eckford, 6 Wall. 484 (1867), wherein a judgment of the Court of Claims giving conclusive effect to a similar "adjudication" was reversed by the United States Supreme Court.—The facts and decision in the Eckford case may be summarized as follows: The United States in 1839 brought an action in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants (Eckford's executors) interposed certain set-offs. The jury found that there was due from the United States to the defendants, $20,545.59. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that

the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified by the jurors aforesaid." [2]

The claim not being paid, the executors brought suit against
25 the United States in the Court of Claims, and offered the record of the circuit court in evidence. Upon these facts, the Court of Claims decided: (1) That the circuit court had jurisdiction of the subject matter of the suit, and the set-off pleaded. (2) That the finding of the jury and the determination of the court constituted, in substance and effect, a valid and binding judgment against the United States for the sum certified by the jury. (3) That such judgment could not be impeached in a collateral suit. (4) That the finding of the jury, under the circumstances stated, was conclusive, and was not subject to reexamination in any federal court. The Court of Claims, therefore, held that it was bound by the jury's finding and the judgment of the circuit court, refused to reexamine the merits of the claim, and entered a judgment against the United States for the said sum of $20,545.59.

On appeal to the Supreme Court, this judgment was reversed, sub nom. United States v. Eckford, 6 Wall. 484 (1867). The Supreme Court, in a unanimous opinion written by Mr. Justice Clifford, held that the circuit courts could not exercise jurisdiction in suits against the United States unless the claimant could bring his case within some act of Congress; that the right of set-off did not exist at common law; that the Act of March 3, 1797, permitted a defendant to interpose properly audited claims in reduction of his alleged indebtedness, even to the discharge of the entire claim of the Government, but that this act did not confer "any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial" (p. 489); "that to permit a de-
mand in set-off to become the foundation of a judgment would
26 be the same thing as sustaining the prosecution of a suit" (p. 490); [3] "that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount" (p. 491).

In other words, the circuit court was without jurisdiction to render an affirmative judgment against the United States; and its "judicial ascertainment" of the amount due the defendant was not conclusive on the Court of Claims. That "finding" could be collaterally attacked. The contrary judgment of the Court of Claims was therefore re-

[2] See Francis R. Tillou et al., Executors of Henry Eckford v. United States, 1 C. Cls. 220 (1865).

[3] Cf. Reeside v. Walker, 11 How. 272, 290 (1850); see also H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5, where the House Judiciary Committee declared that a finding by the federal court in Pennsylvania of the amount due Mrs. Reeside on her cross-claim against the Government was not "binding."

versed, and the case was remanded.[4] Pursuant to that mandate, the $20,545.59 "judgment" was reexamined and subsequently reduced to $4,827.51. Tillou et al., Executors, v. United States, 6 C. Cls. 452 (1870).

The foregoing summary of the Eckford litigation brings out in clear relief its striking parallelism to the proceedings in the instant case. In each controversy the litigation was commenced by the United States, and in each case the defendants interposed certain set-offs. Each court, upon casting up the charges and credits, found that the United States was indebted to the defendants for specific
27 amounts. In each case a judgment was rendered, in substance or effect, that the United States take nothing and that the defendant go without day. In each case the defendants attempted to enforce that "judgment" in a court which had jurisdiction to render a moneyed judgment against the original plaintiff—the Court of Claims in the one case, and the district court of Oklahoma in the other. Each held that the prior "judicial ascertainment" of the amount due was conclusive and not subject to collateral attack, and entered a judgment accordingly. But in so doing, the Court of Claims committed reversible error, and the Supreme Court so held. United States v. Eckford, 6 Wall. 484 (1867). Accordingly, it is submitted that the court below also erred in refusing to reexamine the balance fixed by the court in Missouri.

2. The decision of the Court of Claims in Adams v. United States, 3 C. Cls. 312 (1868), is in direct conflict with the decision in the instant case.—The facts in the Adams case were as follows: The United States in 1852 brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill and a restitution of the same. The case was referred to a master. In 1853 the court found that $10,360.00 was due the defendants and the payment thereof was decreed. No appeal was taken by the Government from this decree. In 1855 Adams, the assignee of the defendants in the California litigation, filed suit in the Court of Claims on said decree. He contended that the California court had jurisdiction, that the decree was *res adjudicata, and that no other evidence of his claim need be presented.* In dismissing his petition the Court of Claims said (pp. 332–333):

"The suit is founded on the decree of the district court of the United States for the northern district of California, finding due to
28 Heslep and Peck, two of the defendants in that case, the sum of $10,360.00 and decreeing that the same sum is due and payable to them, from the United States, with six percent interest from and after the first day of May 1857. Under these facts it cannot be distinguished from the case of Tillou, ex'r of Eckford, v. The United States, reported in 1 C. Cls. R., p. 220. A similar judgment of a circuit

[4] While the official report merely indicates that the case was "Reversed" the mandate of the Supreme Court reads, "And it is further ordered that this cause be and the same is hereby remanded to the said Court of Claims for further proceedings to be had therein in conformity to the opinion of this Court." A photostat of the original mandate has been filed with the Clerk of the convenience of the Court.

court of the United States rendered in favor of a defendant, upon a suit brought by the United States, and set-off pleaded under the act of 1797, was given in evidence, in that case, under objection. We held that the court had jurisdiction of the set-off. That being an indivisible claim, the finding in favor of the defendant, and the judgment entered upon it remaining unreversed, was conclusive of the indebtedness of the United States to the party. But on appeal to the Supreme Court of the United States the judgment was reversed. And it is there held that 'the extent of the authority conferred by the act of 1797 is that the defendant, when sued by the United States, may exhibit his claims for credit if they come within the prescribed conditions, *but they can only be admitted as claims for credit, and not as demands for judgment*' * * *. It is there held that "the defendant may prove his set-off or counterclaim, to an amount sufficient to discharge the whole claim of the plaintiffs, in which event he will be entitled to judgment that he go thereof without day, but the circuit court possesses no jurisdiction to render judgment for any excess of set-off over the plaintiff's claim." [Italics in the original.]

That case is directly in point here. This claim is exclusively founded upon the judgment or decree of the district court of California against the United States, in the proceedings set forth. Under the ruling cited in the Tillou case, *this was beyond the jurisdiction of the court, and to that extent void.*" [Italics supplied.]

That the Adams case presented to the Court of Claims a question identical with that presented to the district court of Oklahoma need not be labored. That the decision of this Court in the instant case is in conflict with that rendered by the Court of Claims in the Adams case and by the Supreme Court in the Eckford case is equally apparent.

In the light of these cases, it was clearly error for the court in Oklahoma to render an affirmative judgment against the Indian Tribes without examining into the merits of the balance "fixed" by the court in Missouri, a court which lacked jurisdiction to render an affirmative judgment against the United States or the Indian Nations.[6]

II

Up to this point it has been assumed that the district court in Oklahoma has jurisdiction, at the instance of an intervener, to render a moneyed judgment against the Indian Nation. This jurisdictional

[6] Reeside v. Walker, 11 How. 272, 290 (1850); De Groot v. United States, 5 Wall. 419, 431 (1866); United States v. Eckford, 6 Wall. 484, 489-491 (1867); The Siren, 7 Wall. 152, 154 (1868); Case v. Terrell, 11 Wall. 199, 201 (1870); Schaumburg v. United States, 103 U. S. 667 (1880); Schaumburg v. United States, 21 Fed. Cas. No. 12, 442 (C. C. E. D. Pa. 1878); Lee v. Kaufman, 15 Fed. Cas. No. 8191 (C. C. E. D. Va. 1879); United States v. Wickersham, 10 Fed. 505, 508 (C. C. W. D. Tenn. 1882); United States v. Nipissing Mines Co., 206 Fed. 431, 434 (C. C. A. 2, 1913); United States v. Various Articles of P. Property, etc., 11 F. Supp. 193, 194 (W. D. N. Y. 1935); Adams v. United States, 3 C. Cls. 312, 333 (1867); Peterson v. United States, 26 C. Cls. 93, 98 (1890); Gerding v. United States, 28 C. Cls. 349, 323 (1891); United States v. Warren, 12 Okla. 350, 354, 71 Pac. 685, 689 (1903); note, 106 A. L. R. 1248; cf. People v. Dennison, 84 N. Y. 272, 281 (1881).

[6] Cf. Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341, 344 (C. C. A. 2, 1918), cert. den. 246 U. S. 663; French Republic v. Inland Nav. Co., 263 Fed. 410, 413 (E. D. Mich. 1920); Re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192, 193 (C. C. A. 9, 1923), affirming 284 Fed. 281, certiorari denied sub nom. McLean v. Australia, 264 U. S. 582; Republic of France v. Pittsburgh S. E. Co., 112 Misc. 688, 184 N. Y. Supp. 280 (1920); note, 106 A. L. R. 1247.

question is particularly important in the event that the Eckford and Adams cases are construed to require a reversal of the judgment below. If the district court has such jurisdiction, then the judgment below should be reversed with directions to determine the interveners' claim on its merits; if it does not have such jurisdiction, then the judgment should be reversed with directions to dismiss the interveners' demand for affirmative relief.[7]

Further examination of the Act of April 26, 1906, 34 Stat. 137, in the light of its legislative history.—Section 18, it will be recalled, authorizes the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and it allows the "party defendants" to such suits to set up and have adjudicated "any claim" they may have against those tribes. Any re-
31 sulting balance is to be paid by the Treasurer of the United States from the funds of said tribes.

But section 18 as originally drafted contained no provision authorizing private claims to be adjudicated by the courts. Instead, claims were to be presented to and settled by the Secretary of the Interior (section 11).[8] The first proposal designed to confer on the courts jurisdiction to adjudicate claims against these tribes was made by Mr. Stephens, of Texas, on the floor of the House, when he proposed the following amendment to section 18:

"Provided further, That any person or persons, firm, corporation, or company having any claim of any nature whatever against the Choctaw, Chickasaw, Creek, or Seminole tribe of Indians, respectively, may file suit before the Court of Claims of the United States at any time within ninety days after the passage of this act, and the Court of Claims of the United States at Washington is hereby given jurisdiction to entertain, try, and determine all such suits."[9]

The following debate then ensued:

"Mr. STEPHENS of Texas. The reason for that is that this section provides that the Secretary of the Interior may bring suit for these Indians against anyone who owes them money, but there is nowhere any provision that when the tribes owe money to any parties and the tribes go out of existence that you can collect the money. There may be outstanding debts. I know of none. I know of no warrants or indebtedness whatever, but it does seem to me a strange provision that the Indians are permitted to bring suit for money owing to them, and yet if they are owing anyone that person is without
32 remedy in law. It seems to me this amendment ought to be adopted in order to make this bill perfect.

[7] In its opinion the Court states that no objection was made to the filing of the petition in intervention and therefore the interveners should be treated as though they had been made parties defendants. The fact is that the application for intervention was presented informally and counsel for the Government orally objected. While no record of this objection has been preserved, evidence that the Government did not acquiesce in the intervention is found in the qualified endorsement of the court's order which reads: "O K as to form. Chas. N. Champion, Asst. U. S. Atty.—Attorney for Plaintiff" (R. 30). Furthermore, the question of the power of the court in Oklahoma to render an affirmative judgment in favor of the interveners is jurisdictional and therefore it is immaterial whether the Government objected. Chicago, R. & Q. R. Co. v. Willard, 220 U. S. 413, 419 (1911); Mitchell v. Maurer, 293 U. S. 237, 244 (1934).

[8] Section 11 of the Act of April 26, 1906, is set out in the appendix.

[9] 40 Cong. Rec., pt. 2, p. 1260 (1906).

"Mr. CURTIS.[10] Mr. Chairman, the gentleman surely does not understand this bill. Section 11 provides for the payment of all legal claims against these tribes, and provides that the Secretary of the Interior shall investigate them and pay them. The effect of this amendment would be to open up the Court of Claims to parties who have claims, who have been coming before Congress for forty years in an attempt to get into some court to prosecute old and unjust claims against the Indians. It would be an outrage upon these tribes to permit people to bring suits in the Court of Claims against them. All manner of claims could be trumped up against them under the amendment offered by the gentleman from Texas if it was adopted, and I sincerely hope it will be voted down. *We have provided amply in section 11 for the payment of every lawful claim that any citizen may have against the Five Civilized Tribes or either of them.* [Italics supplied.]

"Mr. STEPHENS of Texas. I should like to ask the gentleman why he thinks the Secretary of the Interior should pass upon these claims. Why not permit the opening of the courts to them? It would be a judicial question.

"Mr. CURTIS. The gentleman knows that for years people with old stale claims have been trying to get into the Court of Claims and mulct these Indian tribes, if they could. *We believe that the Secretary of the Interior is honest, and that he will carefully investigate every claim that is filed, and that he will render such judgment as he thinks fair and proper in the case. We think it is proper to leave it in his hands.* [Italics supplied.]

33 "Mr. STEPHENS of Texas. Why do you give the tribes the right to go into the courts? Why do you leave the courts open to them, and close the courts [to suits] against the tribes?

"Mr. CURTIS. Because there is no other way that a claim of the Indians can be collected. I hope the amendment will be voted down.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Texas [Mr. Stephens].

"The amendment was rejected."[11]

From the foregoing debate, it is obvious that the House did not intend to confer on the Court of Claims or any other court the right to entertain suits against these tribes. All claims were to be presented to and investigated by the Secretary of the Interior (section 11). He was to render such judgment as he thought fair and proper, and the matter of claims against the tribes was to be left in his hands.

On March 1, 1906, the following action was taken in the Senate:

"Mr. CLAPP [in charge of the bill]. At this time the Senator from Texas [Mr. Bailey], who is absent, asked me to present an amendment to section 18, which I will send up, authorizing a set-off to suits brought. I recommend its adoption.

"The VICE PRESIDENT. The amendment will be stated.

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[10] Mr. Curtis was in charge of the bill on the floor of the House and chairman of the committee which had reported it.

[11] 40 Cong. Rec., pt. 2, p. 1260 (1906).

"The SECRETARY. At the end of section 18, page 26, line 25, after the word 'disposition,' insert:

"'Where suit is now pending, or may hereafter be filed, in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes, to recover moneys
34 claimed to be due and owing to such tribe the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, *and the same may be pleaded by such party defendants as a counterclaim or set-off;* and any *amount* [balance] that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such [tribe or] tribes upon the filing of the decree of the court with him.'

"The amendment was agreed to." [12]

In joint conference the bracketed words were added, and the italicized words were stricken from the foregoing amendment, and as so modified it became law.[13] From these changes it is apparent that "any claim," whether it arose out of the same transaction and whether technically a set-off or not, could be interposed and adjudicated. But inasmuch as the House had disapproved any amendment subjecting the tribes to suit by a "party plaintiff," it is fair to assume that only "party defendants" (i. e. those persons sued by the Secretary of the Interior) were to be allowed recourse to the courts. All other claims were to be determined by the Secretary of the Interior pursuant to section 11 of the act. If the district court, in the exercise of its discretion, can grant leave to intervene, and if these interveners thus become "party defendants" who may, by the terms of the act, interpose "any claim" against these tribes, then the court may thus enlarge its own jurisdiction under section 18 and to that extent cut down the jurisdiction which Congress conferred on the Secretary of the Interior by section 11.

35 Since the act allows a "party defendant" to have "any claim" against the said tribes adjudicated, whether arising out of the same transaction or not, it is submitted the words "party defendants" should be strictly construed, so as not to defeat the purpose of section 11, and so as not to subject the tribes to suits not contemplated by the act of 1906.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be granted.

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NOVEMBER 1939.

[12] 40 Cong. Rec., pt. 4, p. 3206 (1906).
[13] 40 Cong. Rec., pt. 4, p. 3948; pt. 6, pp. 5122, 5264.

Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141.

"SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: Provided, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded."

Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144.

"SEC. 18. That the Secretary of the Interior is hereby author-
37 ized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: Provided, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have

the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

[Clerk's certificate to foregoing paper omitted in printing.]

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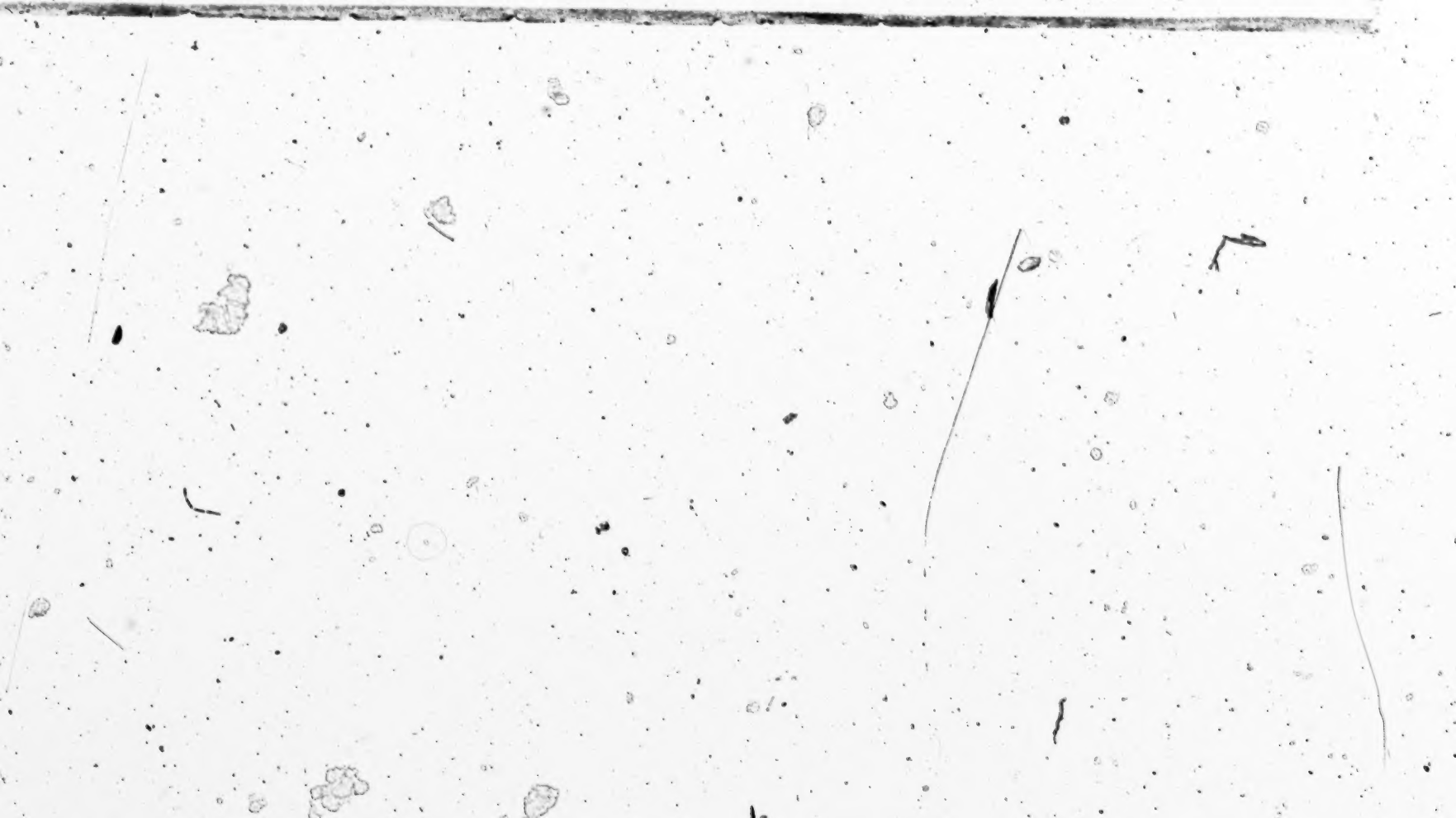

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No. 569

In the Supreme Court of the United States

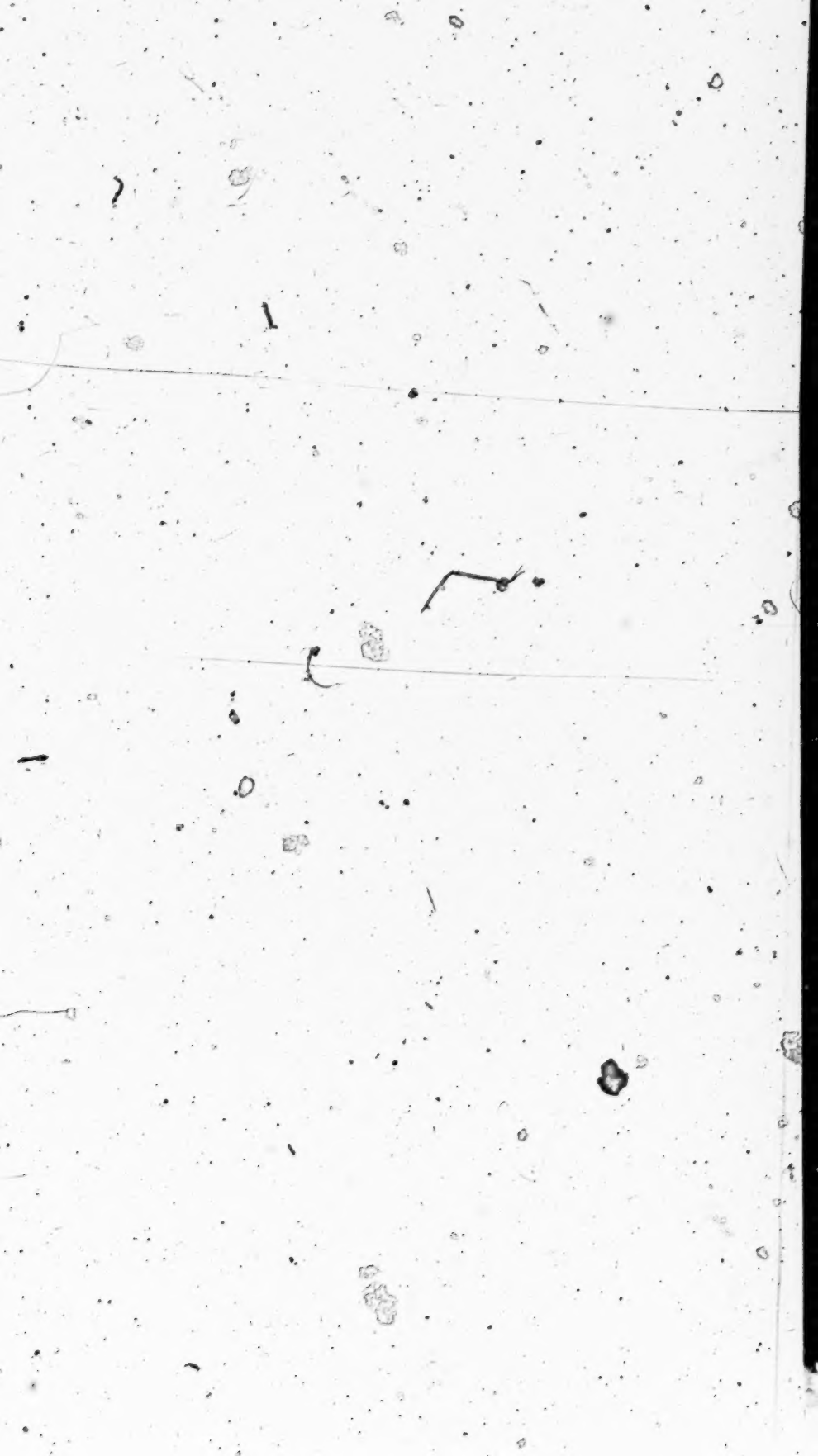
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

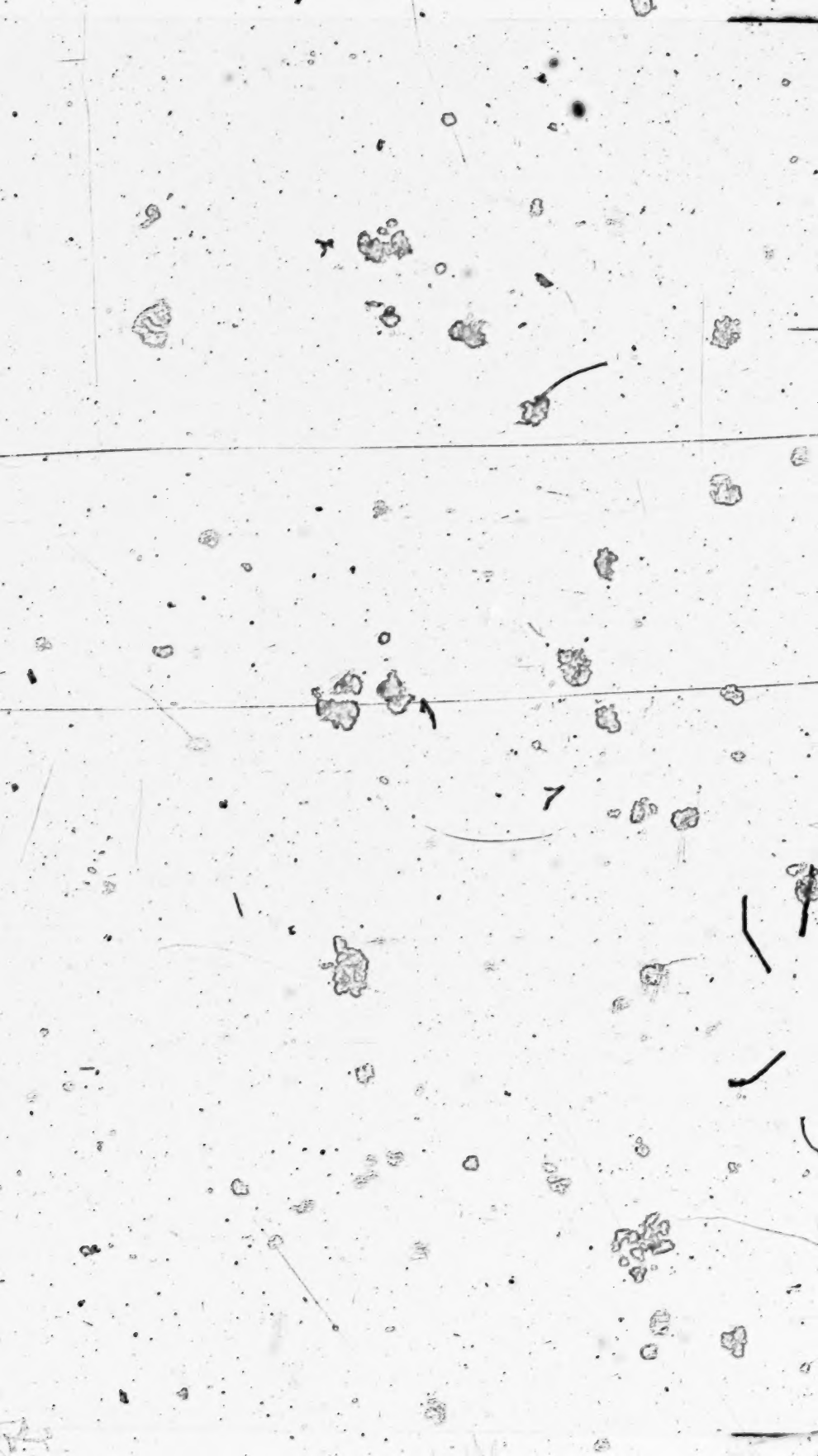


INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	9

CITATIONS

Cases:	
Adams v. *Murphy*, 165 Fed. 304	6
Adams v. *United States*, 3 C. Cls. 312	8
Danforth v. *United States*, No. 309, Oct. Term, 1939	9
French Republic v. *Inland Nav. Co.*, 263 Fed. 410	6
Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341, certiorari denied, 246 U. S. 663	6
Paterson-MacDonald Shipbuilding Co., In re, 293 Fed. 192, affirming 284 Fed. 281, certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582	6
Reeside v. *Walker*, 11 How. 272	8
Republic of France v. *Pittsburgh S. E. Co.*, 112 Misc. 688	6
Stoll v. *Gottlieb*, 305 U. S. 165	7
Thebo v. *Choctaw Tribe of Indians*, 66 Fed. 372	6
Tillou v. *United States*, 1 C. Cls. 220	7
Tillou et al., Executors v. *United States*, 6 C. Cls. 452	8
Turner v. *United States*, 248 U. S. 354	6
United States v. *Eckford*, 6 Wall. 484	7, 8
United States v. *Shaw*, No. —, Oct. Term, 1939	9
Statutes:	
Act of June 28, 1898, c. 517, 30 Stat. 495	2
Act of April 26, 1906, c. 1876, 34 Stat. 137, Sec. 18	2, 6
Miscellaneous:	
106 A. L. R. 1247	6
H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5	8



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UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on September 6, 1939, modifying and affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 143–149) is reported in 106 F. (2d) 804. The opinion of the District Court (R. 125–133) is reported in 24 F. Supp. 961.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on September 6, 1939 (R. 150). A timely (R. 151) petition for rehearing was denied on November 8, 1939 (R. 153). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the balance found to be due the counter-claimant in a suit brought by the United States on behalf of the Choctaw and Chickasaw Nations in the district court in Western Missouri is binding on a district court in Oklahoma possessing special jurisdiction over claims against the tribes. This question turns on whether the Missouri court had jurisdiction to enter an affirmative judgment against the tribes or to make a binding determination of the balance due from them.[1]

STATEMENT

The Choctaw and Chickasaw Nations, pursuant to authority conferred by the Act of June 28, 1898, c. 517, 30 Stat. 495, executed two separate coal and asphalt leases covering certain tribal lands (R. 119, 45, 50).

[1] A further question, which will be urged if the petition be granted, is whether Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, which confers on the federal courts in Oklahoma special jurisdiction to adjudicate "any claim" interposed by the "party defendants" to a suit brought by the Secretary of the Interior on behalf of the Five Civilized Tribes, confers jurisdiction on those courts to adjudicate the claims of an "intervener."

The United States Fidelity and Guaranty Company became surety on the bond given by the lessee for the faithful performance of its obligations contained in the leases (R. 119, 54–56). The Central Coal and Coke Company, a corporation organized under the laws of Missouri, acquired the leases by assignment with the consent of the surety (R. 119, 33–34). The leases provided for payment of advance royalties and deficit royalties (R. 47, 52).

The Central Coal and Coke Company was placed in equity receivership in the United States District Court for the Western District of Missouri (R. 120). Acting on behalf of the Choctaw and Chickasaw Nations, the United States in 1931 filed in that court a claim against the receiver of the said company for advance and deficit royalties totaling $4,800 (R. 120, 34–35). In 1935 the trustee, appointed pursuant to Section 77B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26–28, 36–42). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim to the extent of $11,060.90 (R. 121, 56–66). The court denied exceptions to the report and entered judgment that the United States on behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner provided by law (R. 121, 66–67). No appeal was taken from that judgment (R. 122).

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf

and for the Choctaw and Chickasaw Nations filed suit in the federal district court for the Eastern District of Oklahoma against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties (R. 11–16). The trustee of the Central Coal and Coke Corporation and its predecessor, the Central Coal and Coke Company, by leave of court (R. 29) intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and also pleaded the judgment rendered in that court (R. 24–26). The surety company by amended answer followed the allegations contained in the petition in intervention (R. 16–18). By way of answer and reply the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim (R. 18–22).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; that the judgment rendered therein was valid and not subject to collateral attack; and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90, with interest and costs (R. 119–134).

The judgment of the District Court, except as to interest and costs, was affirmed by the Circuit Court of Appeals. That court held, *inter alia:* (1) that "the Choctaw and Chickasaw Nations are sovereigns immune

to civil suit except when expressly authorized"; (2) that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and (3) that this determination of the balance due the Central Coal and Coke Corporation was binding on the court in Oklahoma, so that the interveners in the Oklahoma proceeding were entitled to an affirmative judgment against the Indian tribes for $9,060.90.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the balance fixed by the district court in Western Missouri was binding on the district court in Oklahoma.

2. In holding that the court in Oklahoma had jurisdiction to render an affirmative judgment in favor of an "intervener."

REASONS FOR GRANTING THE WRIT

The district court for the Western District of Missouri had no jurisdiction to render an affirmative judgment against the United States [2] or against the Choctaw

[2] See petition for writ of certiorari in *United States* v. *Shaw*, filed December 5, 1939, p. 6.

and Chickasaw Nations.[3] The court below found no need to determine whether the district court for Western Missouri had jurisdiction to render an affirmative judgment.[4] Nevertheless, it held that the Missouri court "had jurisdiction to judicially determine" the amount due on the counterclaim, and that its judgment was therefore binding on the district court in Oklahoma (R. 148).

The district court in Oklahoma had jurisdiction to entertain a counterclaim in a suit brought on behalf of the tribes, and to enter an affirmative judgment on the counterclaim. Act of April 26, 1906, c. 1876, 34 State. 137, Sec. 18. But it was not foreclosed by an

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[3] These tribes are sovereigns immune to suit except when expressly authorized. *Turner* v. *United States*, 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C. C. A. 8); *Adams* v. *Murphy*, 165 Fed. 304 (C. C. A. 8). Like other sovereigns they do not subject themselves to affirmative liability on a counterclaim by the mere fact of coming into court. *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410, 413 (E. D. Mo.); *In re Paterson-MacDonald Shipbuilding Co.*, 293 Fed. 192, 193 (C. C. A. 9), affirming 284 Fed. 281, certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582; *Republic of France* v. *Pittsburgh S. E. Co.*, 112 Misc. 688 (1920); note, 106 A. L. R. 1247.

[4] The court in Missouri "merely adjudicated the respective amounts due on the claim and counterclaim, applied sufficient of that due on the counterclaim to offset in full the claim, and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law" (R. 148).

affirmative judgment entered by the district court in Missouri, which had no such jurisdiction.[5]

1. The decision of the court below is in direct conflict with *United States v. Eckford*, 6 Wall. 484. That case followed upon an action brought by the United States in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants interposed certain set-offs. The jury found that $20,545.59 was due from the United States to the defendants. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified". The The claim was not paid and the executors brought suit against the United States in the Court of Claims. The Court of Claims held (1 C. Cls. 220) that it was bound by the jury's finding and the judgment of the circuit court, refused to reexamine the merits of the claim, and entered a judgment against the United States for $20,545.59. This Court reversed. "When the United States is plaintiff," the Court held, "and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of

[5] The jurisdiction of the district court in Missouri was not contested in that court on the present ground, so there is no question of *res judicata* involved in the jurisdictional issue. (R. 22.) See *Stoll* v. *Gottlieb*, 305 U. S. 165.

just demands, the government is indebted to the defendant in an ascertained amount"[6] (p. 491). Therefore, since the circuit court was without jurisdiction to render an affirmative judgment against the United States, its determination of the amount due to the defendant was not conclusive on the Court of Claims.[7] The judgment entered by the district court in Missouri could be no more conclusive on the district court in Oklahoma.

2. The decision of the court below is also in direct conflict with *Adams* v. *United States*, 3 C. Cls. 312. There the United States brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill. The court found that $10,360 was due the defendants and payment was decreed. No appeal was taken by the Government. The assignee of the defendants in the California litigation filed suit in the Court of Claims on the decree. He contended that the decree was *res judicata*, and that no other evidence of his claim need be presented. The Court of Claims dismissed his petition, relying upon the *Eckford* case. It held (pp. 332–333) that set-offs

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[6] Cf. *Reeside* v. *Walker*, 11 How. 272, 290; see also H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5, where the House Judiciary Committee declared that a finding by the federal court in Pennsylvania of the amount due Mrs. Reeside on her cross-claim against the Government was not "binding", because Congress had not conferred on the federal courts jurisdiction to render affirmative judgments on counterclaims.

[7] The case was remanded for further proceedings. Pursuant to that mandate, the $20,545.59 "judgment" of the circuit court was reexamined and subsequently reduced to $4,827.51. *Tillou et al., Executors* v. *United States*, 6 C. Cls. 452.

could only be admitted as claims for credit and not as demands for judgment, and that any affirmative judgment for the excess was beyond the jurisdiction of the court, and to that extent void.

3. A decision by this Court in this case would further clarify the legal problems which arise when cross-claims are filed against the United States in the district courts, a question of much importance both to private litigants and to the Government. A decision in the instant case would complement that sought in *United States* v. *Shaw*, petition for writ of certiorari filed December 5, 1939. Cf. *Danforth* v. *United States*, decided December 4, 1939, No. 309, this Term.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	8
Summary of Argument	9
Argument:	
I. The judgment in Missouri was not conclusive in the Oklahoma suit as regards affirmative recovery on the counterclaim	13
A. No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided	14
B. No affirmative judgment could be rendered against the Indian Tribes in Missouri since Congress had not consented	20
C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma	23
II. The interveners are not "party defendants" within the Act of April 26, 1906, and their claim for affirmative relief should be dismissed	33
Conclusion	41
Appendix	42

CITATIONS

Cases:	
Adams v. *Murphy*, 165 Fed. 304	20, 21
Adams v. *United States*, 3 C. Cls. 312	11, 24, 27
Alabama Girls' Industrial School v. *Reynolds*, 143 Ala. 579	15
Bull v. *United States*, 295 U. S. 247	17, 18, 19
Burrow v. *Citizens' State Bank*, 74 F. 2d 929	39
Carr v. *United States*, 98 U. S. 433	12, 30
Case v. *Terrell*, 11 Wall. 199	14, 30
Chandler Co. v. *Brandtjen, Inc.*, 296 U. S. 53	40
Cherokee Nation v. *Georgia*, 5 Pet. 1	10, 20
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	10, 21
Chicago B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413	39
Chicot County Drainage Dist. v. *Baxter State Bank*, No. 122, this Term, decided January 2, 1940	30, 32

Cases—Continued.

	Page
Commonwealth v. *Matlack*, 4 Dall. (Pa.) 303	15
Commonwealth v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572	15
Commonwealth of Kentucky v. *Todd*, 9 Bush 708	15
De Groot v. *United States*, 5 Wall. 419	10, 14, 16, 24
French Republic v. *Inland Nav. Co.*, 263 Fed. 410	22
Gerding, Adm'x v. *United States*, 26 C. Cls. 319	14
Guaranty Trust Co. v. *United States*, 304 U. S. 126	23
Hall v. *United States*, 91 U. S. 559	17
Holmes v. *State*, 100 Ala. 291	15
Hudson Trading Co., Inc. v. *United States*, 28 F. 2d 744	30
Illinois Central R. R. Co. v. *Public Utilities Comm.*, 245 U. S. 493	11, 15, 22
Kalb v. *Feuerstein*, Nos. 120, 121, this Term	33
Kidder v. *Northwestern Mutual Life Ins. Co.*, 117 Fed. 997	40
Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341, certiorari denied, 246 U. S. 663	22
Leaner v. *K. & L. Box & Lumber Co.*, 6 F. 2d 666	40
Lee v. *Kaufman*, 15 Fed. Cas. No. 8191	14
Minnesota v. *United States*, 305 U. S. 382	12, 30
Mitchell v. *Maurer*, 293 U. S. 237	39
Munro v. *United States*, 303 U. S. 36	30
Nassau Smelting Works v. *United States*, 266 U. S. 101	15, 17
North Dakota-Montana W. G. Ass'n v. *United States*, 66 F. 2d 573, certiorari denied, 291 U. S. 672	16
Owen v. *United States*, 8 F. 2d 992	16
Patterson-MacDonald Shipbuilding Co., In re., 293 Fed. 192, certiorari denied *sub nom. McLean* v. *Australia*, 264 U. S. 582	22
People v. *Dennison*, 84 N. Y. 272	15
People v. *Miles*, 56 Cal. 401	15
Peterson v. *United States*, 26 C. Cls. 93	14
Price v. *United States and Osage Indians*, 174 U. S. 373	38
Real Estate Loan Co. v. *Brown*, 23 F. 2d 329	40
Reeside v. *Walker*, 11 How. 272	10, 11, 14, 15, 17, 24, 28
Republic of France v. *Pittsburgh S. E. Co. Inc.*, 112 Misc. 688	23
Schaumburg v. *United States*, 103 U. S. 667	14, 24
Schillinger v. *United States*, 155 U. S. 163	38
Siren, The, 7 Wall. 152	14
Stanley v. *Schwalby*, 162 U. S. 255	30
State v. *Gaines*, 46 La. Ann. 431	15
State v. *Leckie*, 14 La. Ann. 636	15
State v. *Liberty Oil Co.*, 154 La. 267	15
Stoll v. *Gottlieb*, 305 U. S. 165	30
Francis R. Tillou et al., Executors of Henry Eckford v. *United States*, 1 C. Cls. 220	25
Tillou et al., Executors v. *United States*, 6 C. Cls. 452	27
Thebo v. *Choctaw Tribe of Indians*, 66 Fed. 372	10, 12, 20, 21, 38

Cases—Continued. Page

Turner v. *United States*, 248 U. S. 354 ..... 10, 20, 21
United States Expansion Bolt Co. v. *H. G. Kroncke H. Co.*, 216 Fed. 186, 234 Fed. 868 40
United States v. *Algoma Lumber Co.*, 305 U. S. 415 .. 10, 17, 18, 21
United States v. *Creek Nation*, 295 U. S. 103 21
United States v. *Eastern Coal & Mining Co.*, 66 F. 2d 923 .. 4
United States v. *Eckford*, 6 Wall. 484 ..... 10, 11, 14, 15, 16, 17, 24, 25, 26, 28, 29
United States v. *Michel*, 282 U. S. 656 38
United States v. *Missouri-Kansas-Texas R. Co.*, 66 F. 2d 919 4
United States v. *Nipissing Mines Co.*, 206 Fed. 431, certiorari dismissed, 234 U. S. 765 ..... 14, 16
United States v. *Rea-Read Mill & Elevator Co.*, 171 Fed. 501 .. 21
United States v. *Shaw*, No. 570, this Term 14, 15, 24
United States v. *The Thekla*, 266 U. S. 328 15
United States v. *Various Articles of P. Property, etc.*, 11 F. Supp. 193 14
United States v. *Walker*, 109 U. S. 258 32
United States v. *Warren*, 12 Okla. 350 14
United States v. *Wickersham*, 10 Fed. 505 14

Statutes:

Act of March 3, 1797, c. 20, 1 Stat. 512, 515 15
Act of June 28, 1898, c. 517, Sec. 29, 30 Stat. 495 4
R. S., Sec. 951 (28 U. S. C., Sec. 774) 15
Act of April 26, 1906, c. 1876, 34 Stat. 137:
Sec. 11 42
Sec. 18 ..... 2, 3, 43
Tucker Act (28 U. S. C., Sec. 41 (20)) 16
28 U. S. C., Sec. 71 40

Miscellaneous:

106 A. L. R. 1245 14
40 Cong. Rec.:
P. 1260 ..... 21, 35
P. 3206 37
Pp. 3948, 5122, 5264 37
Equity Rules in 1912:
Equity Rule 30 40
Equity Rule 37 40
Federal Rules of Civil Procedure:
Rule 13 40
Rule 24 40
Rule 86 39
H. Rep. No. 163, 28th Cong., 1st Sess., pp. 2–5 (1844) .. 16, 24, 28
2 Moore, *Federal Practice:*
Sec. 24.02 39
Sec. 24.03 39
Sec. 24.12 40

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 123–129) is reported in 106 F. (2d) 804. The opinion of the district court (R. 108–115) is reported in 24 F. Supp. 961.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 6, 1939 (R. 130). A timely (R. 131) petition for rehearing was denied on November 8, 1939 (R. 133). The petition for a writ of certiorari was filed on December 5, 1939, and was

granted on January 8, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The United States, on behalf of the Choctaw and Chickasaw Tribes, filed a claim in a bankruptcy proceeding in a federal district court in Missouri. The trustee in bankruptcy filed counterclaims, which were allowed by the court. Judgment was entered that the United States, on behalf of the Tribes, take nothing, and that the credit against the Tribes be fixed at $9,060.90, to be secured and collected in the manner provided by law. No appeal was taken. The United States had also brought suit on behalf of the Tribes in a federal district court in Oklahoma against a surety for the bankrupt. The trustee in bankruptcy and a successor corporation of the bankrupt intervened and set up the same counterclaims and the Missouri judgment. Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, confers on the federal courts in Oklahoma jurisdiction to adjudicate counterclaims of "party defendants" in suits brought on behalf of the Choctaw and Chickasaw Tribes. The district court in Oklahoma held that the Missouri judgment was conclusive, and entered judgment that the Tribes take nothing against the surety and that the trustee recover $9,060.90 from the Tribes. The circuit court of appeals affirmed.

The questions presented are (1) whether the judgment or ascertainment by the federal court in Missouri of the balance due the counterclaimant was conclusive in the suit in Oklahoma, and (2) whether, under section 18 of the Act of April 26, 1906, the court in Oklahoma had jurisdiction over the counterclaims of the interveners.

STATUTE INVOLVED

The pertinent sections of the Act of April 26, 1906, c. 1876, 34 Stat. 137, providing for the settlement of claims against the Five Civilized Tribes, are set forth in the Appendix, *infra*, pp. 42–43.

STATEMENT

This action was brought in a federal district court in Oklahoma by the United States on its own behalf and on behalf of the Choctaw and Chickasaw Nations, to recover from the United States Fidelity and Guaranty Company, as surety for the Central Coal and Coke Company, certain unpaid royalties due on mining leases of tribal coal and asphalt lands (R. 9–13).

The pertinent facts may be summarized as follows:

Nature of the Controversy.—The claims and counterclaims which are involved in this action, and were involved in the reorganization proceedings in the federal District Court for the Western District of Missouri, hereinafter referred to, arise out of four mining leases of coal and asphalt deposits belonging to the Choctaw and Chickasaw

Tribes. The leases were made by the Mining Trustees of the Tribes, under authority of the Act of June 28, 1898, c. 517, sec. 29, 30 Stat. 495, 510 (R. 29, 35–37, 40–48, 103).

The Central Coal and Coke Company acquired these leases by assignment (R. 30, 35, 36, 103). The United States Fidelity and Guaranty Company is the surety on a bond guarantying performance of the two leases out of which the claims of the Tribes arise (R. 30, 48–50, 103). Whether it is a surety on the other two leases does not appear. The assignment of the leases to the Central Coal and Coke Company, referred to above, was with the consent of the surety (R. 30).

The leases provided for annual advance royalty payments to be credited against subsequent production, and also for so-called "deficit royalty" payments to be made in the event less than a specified minimum amount of coal was produced in any year (R. 40–48). The claims of the United States for the use of the Tribes are for advance royalties in the sum of $2,000 and for "deficit royalties" in the sum of $2,800,[1] which the Central Coal and Coke Company failed to pay in 1930 and 1931 on leases Nos. 1 and 2 (R. 30–31). The counterclaims are

[1] The claim for "deficit royalties" was waived in the district court in the present suit (R. 109), presumably because the Circuit Court of Appeals for the Tenth Circuit had held such royalties uncollectible. *United States* v. *Missouri-Kansas-Texas R. Co.*, 66 F. 2d 919 (C. C. A. 10, 1933); *United States* v. *Eastern Coal & Mining Co.*, 66 F. 2d 923 (C. C. A. 10).

for advance royalties paid for which the company asserts it should have been given credit against subsequent production, as follows: $773.52 on lease No. 1 (R. 32–33); $773.28 on lease No. 2 (R. 33–34); $4,300 on lease No. 3 (R. 58); and $4,300 on lease No. 4 (R. 58). A further counterclaim is made for $914.10 alleged to have been illegally exacted as "deficit royalties" on lease No. 3 (R. 35). The counterclaims total $11,060.90 (R. 39, 105).

Earlier Litigation.—On June 25, 1931, the United States, acting through the Superintendent of the Five Civilized Tribes, filed a claim on behalf of the Choctaw and Chickasaw Nations against the receiver of the Central Coal and Coke Company for delinquent advance and deficit royalties in the total amount of $4,800 (R. 31). This claim was filed in an ancillary receivership proceeding in the District Court for the Eastern District of Oklahoma, but by agreement between the United States Attorney for the Eastern District of Oklahoma and the receiver the claim was transferred to and treated as if filed in the District Court for the Western District of Missouri, where the original proceeding was pending (R. 32, 104). Thereafter that court approved a petition for corporate reorganization under Section 77B of the Bankruptcy Act (R. 23–24).

On June 19, 1935, J. M. Bernardin, trustee for the Central Coal and Coke Company, filed an answer to the claim of the United States and a cross claim (R. 32–37). The claim of the United States and the answer and cross claim of the trustee were

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referred to a Special Master, who allowed the Government's claim for advance royalties ($2,000), disallowed its claim for deficit royalties ($2,800), and allowed all the credits claimed by the trustee ($11,060.90) (R. 38, 50–59). On February 19, 1936, the District Court for the Western District of Missouri overruled exceptions to the Master's report and entered a judgment which, after confirming the report and offsetting the claims allowed to both parties, provided as follows:

> It is ordered, adjudged, and decreed that the United States in behalf of the Choctaw and Chickasaw Tribes take nothing by virtue of its said claim, and that the credit of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90) of the Central Coal and Coke Company be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law. To all of which the claimant excepts. (R. 59–60.)

No appeal was taken from this judgment (R. 105).

The Present Action.—On December 24, 1935, the United States on its own behalf and for the Choctaw and Chickasaw Tribes brought the present suit in the District Court for the Eastern District of Oklahoma (R. 9–13). No effort was made to bring the case to trial until the judgment of the District Court for the Western District of Missouri had been entered. Thereafter the trustee for the Central Coal and Coke Company and the Central Coal and Coke Corporation, which had taken over

the company's assets pursuant to court order in the reorganization proceedings, were permitted to intervene and set up on their merits the same counterclaims of the Central Coal and Coke Company which had been allowed in the Missouri proceeding, and also to set up the judgment of the District Court for the Western District of Missouri (R. 21–26). The defendant United States Fidelity and Guaranty Company then filed an amended answer in which it set up the judgment as a bar to the present action (R. 13–15). The Government filed a reply to the amended answer (R. 20), and an answer to the intervening petition (R. 27–29), in both of which it alleged that the judgment of the District Court for the Western District of Missouri was void because that court was without jurisdiction.

The material facts were stipulated by the parties (R. 29–90) and the case was submitted to the court without a jury. The Government, without in any way recognizing the validity of the counterclaims asserted, conceded that it was not entitled to recover from the surety unless the judgment of the District Court for the Western District of Missouri was void, and the district court concluded that unless that judgment was void no other question need be considered (R. 107). The court held that the District Court for the Western District of Missouri had jurisdiction of the parties and of the subject matter and that its judgment was valid and not subject to collateral attack (R. 107–115). On

September 3, 1938, the court entered a judgment for costs in favor of the United States Fidelity and Guaranty Company, and for the sum of $9,060.90 and interest in favor of the trustee of the Central Coal and Coke Company and against the Choctaw and Chickasaw Tribes (R. 116–117).

The judgment of the district court, except as to interest and costs, was affirmed by the circuit court of appeals. That court held, *inter alia:* (1) that "the Choctaw and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized;" (2) that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and (3) that this determination of the balance due the Central Coal and Coke Company was binding on the court in Oklahoma, so that the interveners in the Oklahoma proceeding were entitled to an affirmative judgment against the Indian tribes for $9,060.90 (R. 123–129).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that judgment of the federal district court in Missouri was conclusive in the suit in

the federal district court in Oklahoma as regards affirmative recovery on the counterclaims.

2. In holding that the federal district court in Oklahoma had jurisdiction to render an affirmative judgment against the Tribes in favor of the interveners.

SUMMARY OF ARGUMENT

I

The federal district court in Missouri allowed the cross-demand of the trustee of the Central Coal and Coke Company, and entered judgment (1) that the United States in behalf of the Tribes take nothing, and (2) that the credit of the company be fixed as against the Tribes in the amount of $9,060.90. The federal district court in Oklahoma held that this judgment was conclusive, both as barring recovery by the United States on behalf of the Tribes, and as establishing the right of the interveners to recover $9,060.90 from the Tribes.

The Government now concedes that the court in Missouri had jurisdiction to entertain and allow the company's cross-demands for the purpose of extinguishing the claims of the Tribes, and that its judgment was to that extent effective to bar recovery by the Tribes in Oklahoma. The Government contends, however, that the court in Missouri had no jurisdiction to render an affirmative judgment against the Tribes, and that its judgment was without effect and was not conclusive in the suit in Oklahoma.

A. No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided. *Reeside* v. *Walker,* 11 How. 272, 290; *De Groot* v. *United States,* 5 Wall. 419, 421, 431; *United States* v. *Eckford,* 6 Wall. 484, 489–491.

B. The Choctaw and Chickasaw Tribes are immune from suit except as Congress has otherwise provided. *Turner* v. *United States,* 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians,* 66 Fed. 372 (C. C. A. 8). Immunity from affirmative judgment by counterclaim is a part of immunity from suit; hence the Tribes are immune from counterclaim. The immunity of the Tribes from suit may at one time have sprung from their quasi-sovereign status, but it can now more realistically be rested on the degree of control which the United States exercises over them and the relationship, approximating that of guardian and ward, which exists between the United States and the Tribes. Compare *Cherokee Nation* v. *Georgia,* 5 Pet. 1, with *Cherokee Nation* v. *Hitchcock* 187 U. S. 294.

Congress has never consented generally that an affirmative judgment be entered against the Tribes in a suit by them or on their behalf. The Tucker Act does not apply to claims against Indian tribes. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415. By the Act of April 26, 1906, c. 1876, sec. 18, 34 Stat. 137, set out *infra,* p. 43, Congress provided that the Five Civilized Tribes (which include the Choctaw and Chickasaw Tribes) should be subject to af-

firmative judgments by counterclaim in suits brought on their behalf in the federal courts of Oklahoma. This statute did not, however, authorize the affirmative judgment in the court in Missouri: consent to suit or counterclaim in one district is not operative elsewhere. *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma. The court below, while not deciding whether the court in Missouri had jurisdiction to render an affirmative judgment against the Tribes, held that the balance found by the court in Missouri was conclusive.

We have sought to show that the district court in Missouri had no jurisdiction to enter an affirmative judgment against the Tribes, and if a court is without jurisdiction to render a binding affirmative judgment, *a fortiori* no finding by it short of a judgment can be *res judicata*. This Court and the Court of Claims have taken this position in cases closely paralleling the present litigation. *United States* v. *Eckford*, 6 Wall. 484; *Adams* v. *United States*, 3 C. Cls. 312. Cf. *Reeside* v. *Walker*, 11 How. 272.

Nor was the judgment of the court in Missouri *res judicata* as to its jurisdiction to render an affirmative judgment or a conclusive finding against the Tribes. The *Eckford* decision stands in the

way of such a contention, as does the principle that the Attorney General or his subordinates cannot by their silence or acquiescence confer jurisdiction of a suit against the United States or the Tribes if Congress has withheld it. *Carr* v. *United States,* 98 U. S. 433; *Minnesota* v. *United States,* 305 U. S. 382.

II

The interveners are not "party defendants" within the Act of April 26, 1906, c. 1876, 34 Stat. 137. Congress, by section 18 of that Act, authorized the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and provided that parties defendant to such suits could have adjudicated any claims against the Tribes, and that any balance found due by the Tribes should be paid by the Treasurer of the United States out of funds of the Tribes. The affirmative judgment entered by the district court in this case, however, was not in favor of the defendant surety company, but of the interveners. The Act of April 26, 1906, should not be construed as allowing counterclaims by interveners. To do so would subject the Tribes to suit to a greater extent than Congress intended or provided. It is especially desirable that statutes waiving the immunity of Indian tribes from suit receive a narrow construction in view of the great number of claims, meritorious and otherwise, outstanding against them. See *Thebo* v. *Choctaw Tribe of Indians,* 66 Fed. 372, 376 (C. C. A. 8).

ARGUMENT

I

THE JUDGMENT IN MISSOURI WAS NOT CONCLUSIVE IN THE OKLAHOMA SUIT AS REGARDS AFFIRMATIVE RECOVERY ON THE COUNTERCLAIM

The federal district court in Missouri allowed certain of the claims of the Tribes, but also allowed the cross-demands of the trustee in bankruptcy for the Central Coal and Coke Company, and after striking the balance it entered judgment that the Tribes take nothing, and that the credit of the Company be fixed as against the Tribes in the amount of $9,060.90, to be secured and collected as provided by law (R. 59–60). The federal district court in Oklahoma held that this judgment was conclusive, both as barring recovery by the Tribes and as establishing the right of the Company to recover $9,060.90 from the Tribes, and it entered judgment accordingly (R. 116–117).

As explained *infra*, pp. 17–20, the Government does not now question that the court in Missouri had jurisdiction to entertain and allow the Company's cross-demands against the Tribes for the purpose of extinguishing the claims of the Tribes, or that its judgment was to that extent effective to bar recovery by the Tribes in the federal court in Oklahoma. The Government contends, however, that the district court in Missouri had no jurisdiction to render an affirmative judgment against the Tribes and that its judgment was without effect and was not conclusive in the suit in Oklahoma.

A. *No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided.*[2]

As will be shown, the Choctaw and Chickasaw Tribes occupy the same position as does the United States as respects the allowance of cross-demands against them without statutory authority, and the precedents are clear that no affirmative judgment can be entered against the United States on a counterclaim unless Congress has so provided. *Reeside* v. *Walker*, 11 How. 272, 290; *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484, 489–491; *The Siren*, 7 Wall. 152, 154; *Case* v. *Terrell*, 11 Wall. 199, 201; *Schaumburg* v. *United States*, 103 U. S. 667; *Lee* v. *Kaufman*, 15 Fed. Cas. No. 8191 (C. C. E. D. Va.); *United States* v. *Wickersham*, 10 Fed. 505, 508 (C. C. W. D. Tenn.); *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765; *United States* v. *Various Articles of P. Property, etc.*, 11 F. Supp. 193, 194 (W. D. N. Y.); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Peterson* v. *United States*, 26 C. Cls. 93, 98; *Gerding, Adm'x* v. *United States*, 26 C. Cls. 319, 323; *United States* v. *Warren*, 12 Okla. 350, 364 (1903); note.

[2] This point is more fully covered in the Government's brief in *United States* v. *Shaw*, No. 570, this Term, set for argument with the instant case. It is discussed here only in its aspects which are peculiarly relevant to this case, and in so far as is necessary to present this case in its proper perspective.

106 A. L. R. 1245; cf. *People* v. *Dennison*, 84 N. Y. 272, 281 (1881).[3] This doctrine is predicated on the principle that a sovereign cannot be sued without its consent, and this sovereign immunity extends to cross-claims and cross-demands for affirmative relief as much as to original suits.[4] "To permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit." *United States* v. *Eckford*, 6 Wall. 484, 490. See also *Reeside* v. *Walker*, 11 How. 272, 290.

No statute has been enacted consenting to the entry of an affirmative judgment against the United States on a counter claim. By the Act of March 3, 1797, c. 20, Sec. 4, 1 Stat. 512, 515, and its successor legislation (R. S. 951, 28 U. S. C., Sec. 774), Congress provided that in suits brought by the United States no claim for a credit shall be

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[3] The admiralty cases, such as *United States* v. *The Thekla*, 266 U. S. 328, are discussed and distinguished in the Government's brief in *United States* v. *Shaw*, No. 570, this Term.

[4] *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106; *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504–505. This same doctrine prevails in the States. *People* v. *Miles*, 56 Cal. 401 (1880); *Commonwealth of Kentucky* v. *Todd*, 9 Bush 708, 716 (Ky. 1873); *Commonwealth* v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572, 574 (1884); *State* v. *Leckie*, 14 La. Ann. 636, 638 (1859); *State* v. *Gaines*, 46 La. Ann. 431, 432 (1894); *State* v. *Liberty Oil Co.*, 154 La. 267, 270 (1923); *People* v. *Dennison*, 84 N. Y. 272, 281 (1881); *Commonwealth* v. *Matlack*, 4 Dall. 303 (Pa. 1804); see also *Holmes* v. *State*, 100 Ala. 291, 294 (1893); *Alabama Girls' Industrial School* v. *Reynolds*, 143 Ala. 579, 583 (1904).

admitted, except in certain enumerated circumstances, unless it has been presented to and disallowed by the General Accounting Office (formerly the accounting officers of the Treasury). Under this statute a defendant in a suit by the United States can, if he has complied with the statute, interpose crossclaims by way of reduction or extinguishment of the Government's demand. But it is well settled that the Act of 1797 does not permit an affirmative judgment. *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765.[3]

The Tucker Act, 28 U. S. C. Sec. 41 (20), confers no such authority. It authorizes original suits against the United States in the district courts but it is apparently not broad enough to permit the recovery of demands upon counterclaims, even where the balance is less than $10,000. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2). Cf. *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573, 577–578 (C. C. A. 8); certiorari denied, 291 U. S. 672; *Owen* v. *United States*, 8 F. 2d 992, 993 (C. C. A. 5). In any event, the Tucker Act is not applicable in any way

[3] In H. Rep. No. 163, 28th Cong., 1st Sess. (Ser. No. 445), pp. 2–5 (1844), the House Judiciary Committee pointed out that Congress had not conferred on the federal courts jurisdiction to render affirmative judgments on counterclaims interposed by a defendant.

to claims against an Indian tribe. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

It is, indeed, doubtful in what circumstances a defendant sued by the United States can, in the absence of statutory consent, interpose cross-claims even solely for the purpose of defeating the claim against him. This Court has several times stated, sometimes with reference to the Act of 1797 and sometimes generally, that a defendant in a suit by the Government cannot interpose claims for credit, even solely by way of reduction or extinguishment of the Government's demand, unless he can bring himself within some particular permissive statute of Congress. See, e. g., *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106; *Hall* v. *United States*, 91 U. S. 559, 562; *United States* v. *Eckford*, 6 Wall. 484, 488; *Reeside* v. *Walker*, 11 How. 272, 290.

In *Bull* v. *United States*, 295 U. S. 247, 261, however, the Court stated that a claim arising out of the same transaction from which the Government's demand stems can be set up as a defense to the Government's demand by way of recoupment and credit. The Court plainly meant that such a recoupment was permissible without statutory authority, and undoubtedly intended to draw a distinction between cross-demands unrelated or only remotely related to the Government's demand and those so closely related to the Government's claim that they might be considered as defensive matter

rather than as independent cross-actions. See 295 U. S. at 262. This is, in essence, the distinction between the common-law defense of recoupment and the purely statutory remedy of set-off.

The distinction of the *Bull* case, apart from questions of statutes of limitations, is for the most part academic as regards the United States, since defendants will ordinarily comply with the Act of 1797 rather than take the chance that their cross-demands may be allowed by way of recoupment without statutory authority. It is, however, not academic as regards Indian tribes in general, or the Choctaw and Chickasaw Tribes in particular, since there is no statutory authority for set-off against them, aside from the Act of April 26, 1906 (set out *infra*, p. 43), which confers on the federal courts in Oklahoma jurisdiction of cross-demands against the Five Civilized Tribes in certain suits brought on their behalf. The Act of 1797 plainly does not apply to credits against Indian tribes in suits brought by the United States on behalf of the tribes. The General Accounting Office has no jurisdiction over claims against Indian tribes, and the 1797 Act undoubtedly had reference only to suits by the United States in its own behalf and to cross-demands against the United States itself. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

The federal court in Missouri, therefore, had no jurisdiction to entertain a set-off against the claims

filed by the United States on behalf of the Choctaw and Chickasaw Tribes. The trustee could, however, under the doctrine of the *Bull* case, set up by way of recoupment, and as a defense, claims of the bankrupt against the Tribes arising out of the same transactions out of which the claims of the Tribes against the bankrupt arose. The claims of the Tribes which were allowed by the court were for $2,000.00, and arose out of coal leases Nos. 1 and 2 (R. 31, 55). The trustee was allowed credits totaling $1,546.80 arising out of these two leases, and credits totaling $9,514.10 arising out of leases Nos. 3 and 4 (R. 56–58). Allowance of the credits arising out of the two leases under which the claims of the Tribes derived—leases Nos. 1 and 2—was undoubtedly permissible as a defense or recoupment. It is very doubtful, on the other hand, whether the credits arising out of leases Nos. 3 and 4 were permissible recoupments, that is, whether they arose out of the same transaction as the claims of the Tribes. If not, a judgment for a balance of $453.20 should have been entered for the Tribes. The Government does not, however, wish to press on this review the question whether the cross-demands under leases Nos. 3 and 4 were permissable recoupments for the purpose of extinguishing the claims of the Tribes. It may be desirable that the defense of recoupment cover all claims as nearly related to the plaintiff's demand as were all the cross-claims in this suit, since they obviously

do not pose the problems which would arise if, for instance, the attempt were to interpose a set-off arising out of dealings with one department of the Government where the main suit arose out of wholly distinct transactions with another department.

But the court in Missouri went beyond recoupment or even set-off, and entered an affirmative judgment against the United States. This it had no power to do.

B. *No affimative judgment could be rendered against the Indian tribes in Missouri since Congress had not consented*

The Choctaw and Chickasaw Tribes cannot be sued except when Congress has so authorized. *Turner* v. *United States*, 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C. C. A. 8); *Adams* v. *Murphy*, 165 Fed. 304 (C. C. A. 8). The court below so recognized (R. 128–129), and respondents so concede (Br. in Opp., p. 10). The exemption of Indian tribes from suit except as Congress provides might once have derived from the quasi-sovereign status of certain of the tribes, which was formerly comparable in some respects to that of States of the union. See *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 374–376. Cf. *Cherokee Nation* v. *Georgia*, 5 Pet. 1. Its present basis, however, is doubtless the degree of control which the United States has long exercised over the Indian tribes, including the Choctaws and

Chickasaws, and the relationship between the tribes and the United States, which is comparable to that of guardian and ward. See *Turner* v. *United States*, 248 U. S. 354, 358; *United States* v. *Creek Nation*, 295 U. S. 103, 109–110; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 305–306. It seems clear, therefore, that the exemption of the Tribes is the same as that of the United States, though the Tribes are not, in any ordinary sense, agencies or instrumentalities of the United States.

Congress, to prevent the Indian tribes from being harassed by frivolous claims and expensive litigation, has never given any general consent to suits against them. *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 376; *Adams* v. *Murphy*, 165 Fed. 304, 309. See 40 Cong. Rec., p. 1260 (1906). As has been stated, the Tucker Act does not apply to claims against Indian tribes. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. It is true that Congress has expressly subjected the Five Civilized Tribes to affirmative judgments on claims interposed by the "party defendants," but only in suits brought by the Government on behalf of the Tribes in the federal courts of Oklahoma. Act of April 26, 1906, c. 1876, Sec. 18, 34 Stat. 137, 144, set out *infra*, p. 43.[6] This Act confers no such jurisdiction on

[6] The Act (Sec. 18) confers jurisdiction on "the United States courts in Indian Territory." The federal district courts in Oklahoma have succeeded to this jurisdiction. See *United States* v. *Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 512 (C. C. E. D. Okla.).

the district courts in Missouri; while it did not deprive other federal courts of their general jurisdiction, it conferred no special jurisdiction on courts other than the federal courts of Oklahoma. And consent to be sued in one district on a counterclaim is not to be construed as authorizing such suits elsewhere. *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

Since the Indian tribes are exempt from direct suit except with the consent of Congress, the United States does not by coming into court on their behalf subject them to affirmative liability by way of counterclaim.[7] It has already been shown that the United States does not by suing subject itself to affirmative judgment by counterclaim, and that the immunity of the tribes from suit is probably identical with that of the United States. If, however, the Indian tribes are more to be compared to foreign sovereigns, such sovereigns do not subject themselves to liability on a counterclaim by the mere act of bringing suit. *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410, 413 (E. D. Mo.); *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192, 193 (C. C. A. 9), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582;

[7] Respondents so concede (Br. in Opp. p. 10).

Republic of France v. *Pittsburgh S. E. Co., Inc.*, 112 Misc. 688 (N. Y., 1920).[8]

C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma

The judgment of the federal district court in Missouri was "that the United States in behalf of the Choctaw and Chickasaw Tribes take nothing," and that the credit of the company in the amount of $9,060.90 "be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law" (R. 60). The court below said that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes because it had not done that but had merely fixed the balance due from the Tribes to the Company, and the court below held that the balance found by the court in Missouri was conclusive in the suit in Oklahoma (R. 128).

We have sought to show that the district court in Missouri had no jurisdiction to enter an affirmative judgment against the Tribes, and it seems obvious that that court purported to do just that. But even accepting the interpretation of the judgment of the court in Missouri which was adopted by the

[8] In *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134, the Court enumerated various liabilities to which a foreign sovereign subjects itself by appearance as a suitor in a domestic forum. Susceptibility to an affirmative judgment by counterclaim is, significantly, not mentioned.

court below, that judgment was not binding in the suit in Oklahoma.

If a court is without jurisdiction to render a binding affirmative judgment against the United States or the Indian tribes, *a fortiori* no finding by it short of a judgment can be *res judicata*. Such a court may, for what it is worth, state the balance it believes to be due the defendant over and above the amount used to extinguish the claim of the United States or the tribes, even though it has no jurisdiction to render an affirmative judgment against them.[9] Congress, if it sees fit, can settle a claim on the basis of such an ascertainment, although no instance of its ever having done so is known.[10] But the balance so fixed would not be binding in subsequent judicial proceedings. This Court and the Court of Claims have so held in *United States* v. *Eckford*, 6 Wall. 484, and *Adams* v. *United States*, 3 C. Cls. 312. Long ago the House Judiciary Committee expressed a similar opinion. H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445) (1844). And compare *Reeside* v. *Walker*, 11 How. 272.

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[9] See *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484, 491; *Schaumburg* v. *United States*, 103 U. S. 667. The *Schaumburg* case held that a refusal to make such a finding was not reviewable.

[10] The practice of Congress in this respect is discussed in the Government's brief in *United States* v. *Shaw*, No. 570 this Term, set for argument with the instant case. See also *infra*, pp. 28–29.

1. The *Eckford* case may be summarized as follows: The United States in 1839 brought an action in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants, Eckford's executors, interposed certain set-offs. The jury found that there was due from the United States to the defendants $20,545.59. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified by the jurors aforesaid."

The claim not being paid, the executors brought suit against the United States in the Court of Claims, and offered the record of the circuit court in evidence. Upon these facts, the Court of Claims decided: (1) That the circuit court had jurisdiction of the subject matter of the suit, and the set-off pleaded. (2) That the finding of the jury and the determination of the court constituted, in substance and effect, a valid and binding judgment against the United States for the sum certified by the jury. (3) That such judgment could not be impeached in a collateral suit. The Court of Claims, therefore, refused to reexamine the merits of the claim and entered a judgment against the United States for the sum of $20,545.59. *Francis R. Tillou et al., Executors of Henry Eckford* v. *United States*, 1 C. Cls. 220.

On appeal to this Court that judgment was reversed, *sub nom. United States* v. *Eckford*, 6 Wall. 484. In a unanimous opinion this Court held that the circuit courts could not exercise jurisdiction in suits against the United States unless the claimant could bring his case within some act of Congress; that the right of set-off did not exist at common law; that the Act of March 3, 1797, permitted a defendant to interpose properly audited claims in reduction of his alleged indebtedness, even to the discharge of the entire claim of the Government, but that this act did not confer "any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial" (p. 489); "that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit" (p. 490); "that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount" (p. 491). The judgment of the Court of Claims was therefore reversed, and the case was remanded. Pursuant to the mandate, the $20,545.59 judgment of the circuit court was reex-

amined and subsequently reduced to $4,827.51. *Tillou et al., Executors,* v. *United States,* 6 C. Cls. 452.

The Eckford litigation strikingly paralleled that in the instant case. In each a suit was brought by the United States, and the defendants interposed certain set-offs which exceeded the plaintiff's demands. In each case a judgment was rendered that the United States take nothing and that specific amounts were due and owing to the defendants. In each case the defendants attempted to enforce that "judgment" or "ascertainment" in a court which had jurisdiction to render a judgment against the plaintiff—the Court of Claims in the one case, and the district court in Oklahoma in the other. Each held that the prior "judicial ascertainment" of the amount due was conclusive and not subject to collateral attack and entered a judgment accordingly. We submit that the court below, as did the Court of Claims, committed reversible error.

2. In *Adams* v. *United States,* 3 C. Cls. 312, the United States had brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill. The court found that $10,360 was due the defendants and payment was decreed. No appeal was taken by the Government. Adams, the assignee of the defendants in the California litigation, filed suit in the Court of Claims on the decree. He contended that the decree was *res judicata,* and that

no other evidence of his claim need be presented. The Court of Claims dismissed his petition, relying upon the *Eckford* case. It held (pp. 332–333) that set-offs could only be admitted as claims for credit and not as demands for judgment, and that any affirmative judgment for the excess was beyond the jurisdiction of the court in California and to that extent void.

3. H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445) represents one episode in the much litigated Reeside claim.[11] In 1839 the United States had brought suit in a federal court in Pennsylvania to recover $32,709 which was still allegedly due on Reeside's postal account. Reeside's executrix counterclaimed for a much larger sum, and the jury found that a balance of $188,496.06 was due the estate. There was "judgment on the verdict" in 1842. Mrs. Reeside then applied to Congress for relief, contending that the certificate of the jury and the judgment was binding on the United States "as a debt of record." In its report to the House on this claim, the Judiciary Committee in 1844 said (H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5):

> Your committee * * * come to the conclusion that the verdict, in an action by the United States for the recovery of a debt, should be a general one, either for or against the plaintiffs; and that the return of the verdict, and the judgment upon it, in the pres-

[11] See *Reeside* v. *Walker*, 11 How. 272.

ent instance, is a bar to any future claim by the Government against the estate of James Reeside. But, that, when the jury went further than a general finding for the defendant, and returned a "certificate" of a balance being due to him by the Government, it was extraneous, and was unauthorized by any law known to your committee. It can be considered in no other light than as the private opinion, or conclusion, of twelve men, as to the balance of complicated and confused accounts; but affords no *judicial evidence* that it is "a debt of record" * * * [12]

Nor can it be contended that the judgment of the court in Missouri was *res judicata* as to the jurisdiction of that court to render an affirmative judgment (or a conclusive finding) against the Indian Tribes. Such a contention could equally have been made in the *Eckford* case, and is tacitly, if not squarely, rejected by the decision of this Court in that case. The objections here raised as to the jurisdiction of the court in Missouri were not made in that court.

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[12] The report continues: "The United States may happen, in many cases, to be the debtor to the defendant, upon the final adjustment of complicated accounts; but it will require the enactment of a law of Congress to give authority to a jury to place the Government in that predicament, and by their verdict, or by any declaration of opinion accompanying their verdict, to afford evidence of the amount of the debt, so that it can receive the sanction of a judicial judgment, and be established as an incontrovertible or final 'debt of record.'"

As between private litigants a judgment of a court appears, at least in some circumstances, to be *res judicata* as to that court's jurisdiction over the controversy, not only if the jurisdictional issue was litigated but also if it could have been. *Chicot County Drainage Dist.* v. *Baxter State Bank*, No. 122 this Term, decided January 2, 1940. Compare *Stoll* v. *Gottlieb*, 305 U. S. 165. But it is plain that that rule does not apply where the jurisdictional issue is whether Congress has consented to the suit. To apply it there would defeat the principle that the Attorney General or his subordinates cannot by their silence, or even acquiescence, confer jurisdiction on a court of a suit against the United States if Congress has withheld consent to suit, since neither the Attorney General or any of his subordinates has been authorized to submit the United States to suit. *Case* v. *Terrell*, 11 Wall. 199, 202; *Carr* v. *United States*, 98 U. S. 433, 435–439; *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *Munro* v. *United States*, 303 U. S. 36, 41; *Minnesota* v. *United States*, 305 U. S. 382, 388–389. In *Carr* v. *United States*, it was contended that judgments in certain earlier cases in which the United States Attorney had appeared were *res judicata*, but the Court rejected the contention because he had no authority to submit the United States to suit. See also *Hudson Trading Co., Inc.*, v. *United States*, 28 F. 2d 744 (C. C. A. 3).[18]

[18] The present litigation well illustrates the wisdom of the rule that the exemption of the United States and the Indian

There are other objections to any application of the doctrine of *res judicata* to the jurisdictional question here. The jurisdiction of the court in Missouri was not exceeded until that court entered the particular judgment it did. The court in Missouri had jurisdiction of the Government's suit for unpaid royalties; it had jurisdiction of the Company's cross-demands pleaded "by way of recoupment or credit"; it had jurisdiction to apply "sufficient of that due on the counterclaim to offset in full the claim"; and, if it saw fit, it could express its opinion as to how much it believed to be still due the defendant. If the court in Missouri, after examining the evidence, had entered a judgment that the United States take nothing, and that the Central Coal and Coke Company "go without day," there would be no question that the court was acting within its jurisdiction. It was not until the court went one step further and fixed the balance at $9,060.90 "to be secured and collected in the manner provided by law" that the present question of jurisdiction arose. And if the court below is correct in

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tribes from suit except as Congress has consented is not to be defeated by the silence or acquiescence of the Government's attorneys. There was, as will be shown, no reason to anticipate in advance that the court in Missouri would exceed its jurisdiction. And the Department of Justice was not informed by its local agents of the judgment which the court had entered until after the time for appealing from it had expired.

its assumption that this was nothing more than a "go-without-day" judgment, then the court in Missouri at no time exceeded its jurisdiction. In filing its claim for royalties, and in allowing defendants to plead other claims "by way of recoupment and credit," the Government was not obliged to assume that the court would do more than issue the usual "go-without-day" judgment.

The rule of the *Chicot County* case should not apply where the court exceeded its jurisdiction only in respect to the form of the decree ultimately entered.[14] To say the right to file a motion to vacate or modify the judgment constituted an opportunity to raise the jurisdictional issue would practically foreclose every collateral attack on a void judgment.

From still another view, the *Chicot County* case is inapplicable here. Congress has with abundant clarity indicated its intention that affirmative judgments should not be entered against the Indian Tribes save in the federal courts in Oklahoma. Since there is no question of its power so to provide, "considerations as to whether the issue of jurisdiction was actually contested * * * or

[14] Compare *United States* v. *Walker*, 109 U. S. 258, 266, where the Court said: "Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

whether it could have been contested are not applicable." *Kalb* v. *Feuerstein,* Nos. 120, 121, this Term.

II

THE INTERVENERS ARE NOT "PARTY DEFENDANTS" WITHIN THE ACT OF APRIL 26, 1906, AND THEIR CLAIM FOR AFFIRMATIVE RELIEF SHOULD BE DISMISSED

It has been shown that the action of the Missouri court, be it labeled a "judgment" or a "finding," is not binding insofar as it attempted conclusively to determine the balance which was due the Central Coal and Coke Company. But there remains one further question. Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137 (set out *infra,* p. 43), authorizes the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and it allows the "party defendants" to such suits to set up and have adjudicated "any claim" they may have against those Tribes, and provides that any balance found due by the Tribes shall be paid by the Treasurer of the United States out of any funds of the Tribes. The court below held, contrary to the Government's contention, that this Act conferred on the courts in Oklahoma jurisdiction not only to adjudicate counterclaims set up by parties defendant, but also counterclaims interposed by interveners, and it entered judgment in favor of the intervenors on their counterclaims (R. 116–117). If the court

below was correct in its interpretation of the Act, the interveners' claims should go back to the district court to be determined on their merits; but if Section 18 of the Act of April 26, 1906, does not confer jurisdiction on the courts in Oklahoma over counterclaims of interveners, then the interveners' demand for affirmative relief should be dismissed.[18]

The defendant, the surety company, did not seek, and, of course, had no basis for seeking, an affirmative judgment against the Tribes. The "intervening petition," on the other hand, shows unmistakably that the primary purpose of the interveners was not to defeat the action against the surety company, but to secure affirmative judgment on their counterclaims against the Tribes (R. 21-23). The petition nowhere describes the interveners as defendants, or states that their interest in the litigation is limited to that of defendants. On the contrary, it asserts that in the proceeding in Missouri it was determined that a balance was owing to the trustee by the United States, and it prays that the judgment in Missouri be decreed to be valid, and that there be a determination of accounts between the interveners and the Tribes (R. 25). The order granting leave to intervene authorized the interveners generally "to file an intervening petition" and required the plaintiff to answer it (R. 26). The order in no manner indicates that

[18] In that event they may present their claim to the Secretary of the Interior as provided for in Section 11 of the Act of April 26, 1906, set out, *infra*, p. 42.

the interveners were to occupy the position of defendants. In view of these circumstances it seems clear that even if it be assumed that interveners might sometimes be parties defendants within the meaning of the Act of 1906, these interveners were not in this case.

The legislative history of Section 18 indicates that an intervener is not a party defendant within the meaning of that section. Section 18 as originally drafted contained no provision authorizing private claims against the Tribes to be adjudicated by the courts. Instead, claims were to be presented to and settled by the Secretary of the Interior, as provided in Section 11 of the statute as enacted (set out *infra*, p. 42). The first proposal to confer any jurisdiction on the courts was made by Mr. Stephens, of Texas, who introduced an amendment from the floor of the House which would have conferred jurisdiction on the Court of Claims to entertain suits against the Five Civilized Tribes (40 Cong. Rec., p. 1260). Mr. Curtis, who was in charge of the bill on the floor of the House and was chairman of the committee from which it was reported, opposed the amendment, on the ground that claims against the Tribes should be left to the Secretary of the Interior. He said, *inter alia* (40 Cong. Rec., p. 1260):

> * * * The effect of this amendment would be to open up the Court of Claims to parties who have claims, who have been coming before Congress for forty years in an

attempt to get into some court to prosecute old and unjust claims against the Indians. It would be an outrage upon these tribes to permit people to bring suits in the Court of Claims against them. All manner of claims could be trumped up against them under the amendment offered by the gentleman from Texas if it was adopted, and I sincerely hope it will be voted down.

* * * * *

The gentleman knows that for years people with old stale claims have been trying to get into the Court of Claims and mulct these Indian tribes, if they could. We believe that the Secretary of the Interior is honest, and that he will carefully investigate every claim that is filed, and that he will render such judgment as he thinks fair and proper in the case. We think it is proper to leave it in his hands.

The amendment was defeated. 40 Cong. Rec., p. 1260.

On March 1, 1906, the following amendment to Section 18 was proposed from the floor of the Senate and adopted:

Where suit is now pending, or may hereafter be filed, in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes, to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, [and the same may be pleaded by

such party defendants as a counterclaim or set-off;] and any [amount] *balance* that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such *tribe or* tribes upon the filing of the decree of the court with him. (40 Cong. Rec., p. 3206.)

In joint conference the italicized words were added, and the bracketed words were stricken from the foregoing amendment, and as so modified it became law. 40 Cong. Rec. 3948, 5122, 5264. From these changes it is apparent that "any claim", whether it arose out of the same transaction and whether technically a set-off or not, could be interposed and adjudicated. But inasmuch as the House had disapproved an amendment subjecting the Tribes to suit generally, it is fair to assume that only "party defendants" (i. e., those persons sued by the Secretary of the Interior) were to be allowed recourse to the courts. All other claims were to be determined by the Secretary of the Interior pursuant to Section 11 of the Act.

If the district court can grant leave to intervene in the exercise of its discretion, and if interveners thus become "party defendants" who may, by the terms of the Act, interpose "any claim" against these Tribes, whether arising out of the same transaction or not, and whether acquired by assignment or otherwise, the Tribes will be subjected to a liability to suit obviously far greater than was contemplated by Congress, and the purpose of Section

11 to confer general authority on the Secretary of the Interior to dispose of claims against the Tribes will be in considerable measure defeated.

Statutes waiving immunity from suit receive a narrow construction. *Schillinger* v. *United States*, 155 U. S. 163, 166; *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375–376; *United States* v. *Michel*, 282 U. S. 656, 659. This rule is especially applicable where the Indian tribes are involved. The resources of these Tribes are relatively limited, and, as stated by Mr. Curtis during the debate attending the passage of the Act (set out *supra*, pp. 35–36), the number and extent of the claims, meritorious or otherwise, outstanding against the tribes is overpowering. These factors were recognized by the Circuit Court of Appeals for the Eighth Circuit in *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372. It there said (66 Fed. at 376):

> As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms. * * *

Other considerations point to the same result. In the present case the interveners—the trustee of the Central Coal and Coke Company and the Cen-

tral Coal and Coke Corporation—were not named parties defendant in the law action brought by the United States against the surety in the Oklahoma court, but became parties by intervening.[16] As has been pointed out, their primary purpose was not to defeat the action against the surety company, but to secure an affirmative judgment against the Indian tribes. And their claim for affirmative relief, it will be recalled, arose out of leases not involved in the suit filed against the surety.

The court below seems to have assumed that the 1912 Equity Rules, then in force,[17] governed the scope of intervention in this proceeding (R. 148–149). But the present action against the surety was one at law, where the right to intervene was a mooted question. See *Byrrow* v. *Citizens' State Bank*, 74 F. (2d) 929 (C. C. A. 5). Cf. 2 Moore, *Federal Practice*, secs. 24.02 and 24.03. Even conceding that the old Equity Rules were applicable to intervention in a law action, it is obvious that the interveners were attempting to assert rights not available to the surety and that they did not enter in subordination to the main action as

[16] Since the question now under discussion is jurisdictional, it is not material that the record fails to indicate an exception to the order granting leave to intervene. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

[17] The Federal Rules of Civil Procedure, which became effective September 16, 1938, are not applicable because final judgment was entered in this case on September 3, 1938 (R. 116; see Rule 86).

required by Equity Rule 37.[18] While Equity Rule 30 authorized counterclaims under certain circumstances, the restrictive implications of Equity Rule 37 in almost all instances foreclosed a counterclaim by an intervener. *Chandler Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 58–59; *Leavet* v. *K. & L. Box & Lumber Co.*, 6 F. 2d 666 (N. D. Cal.).[19] In the *Brandtjen* case this Court pointed out, 296 U. S. at 56–59, that an intervener's legal position "differs essentially" from what it would have been had he been named a defendant originally. And it expressly disapproved a lower court decision (*United States Expansion Bolt Co.* v. *H. G. Kroncke H. Co.*, 216 Fed. 186 (D. Wis.), 234 Fed. 868 (C. C. A. 7)), insofar as it permitted an intervener to counterclaim for the infringement of patents other than those set out in the original bill.[20]

---

[18] The relevant portion of Equity Rule 37 reads: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

[19] The subordination requirement was so restrictive that it was deliberately omitted from the new Rules (see Rules 13 and 24). Cf. 2 Moore, *Federal Practices*, 1938, sec. 24.12.

[20] Other situations where an intervener is not deemed a defendant for all purposes may be cited. For instance, the federal statutes allowing a "defendant" to remove a case from a state to a federal court (28 U. S. C. sec. 71) have been held not to authorize removal by an "intervener." *Kidder* v. *Northwestern Mut. Life Ins. Co.*, 117 Fed. 997 (C. C. Ind.), unless the facts indicate that the intervener was deliberately left out of the proceeding in an effort to circumvent the purpose of the removal statute. *Real Estate Loan Co.* v. *Brown*, 23 F. 2d 329 (N. D. Ga.).

In the light of this state of the law, even long after 1906, it seems clear that Congress by the Act of 1906 had no intention of permitting intervention, in a suit brought on behalf of the Tribes, for the purpose of litigating any and all claims against the Tribes.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

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CHARLES R. DENNY,
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Attorneys.

FEBRUARY 1940.

Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141.

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

ction 18 of the Act of April 26, 1906, c. 1876, 34
137, 144.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

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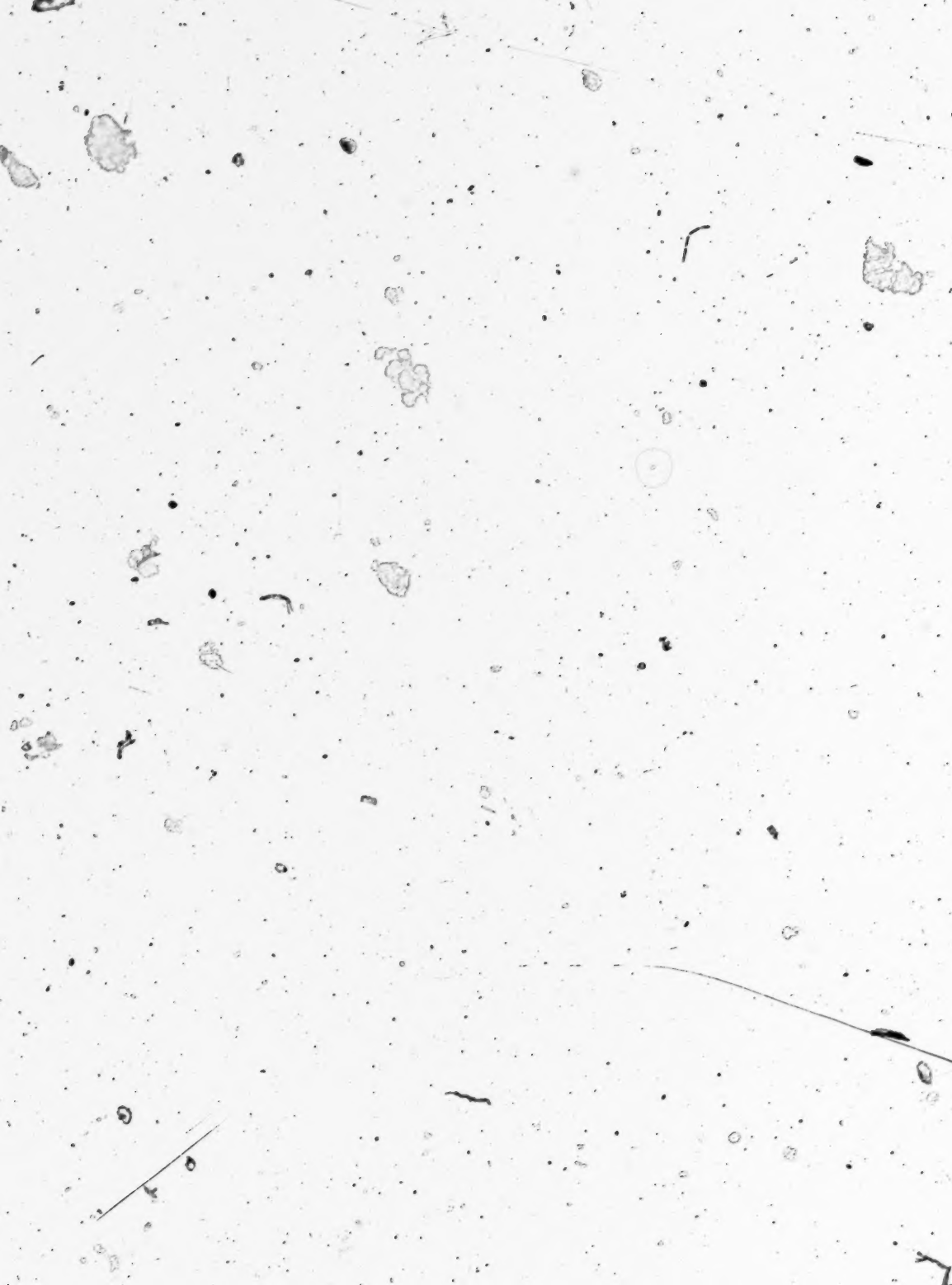


No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1939

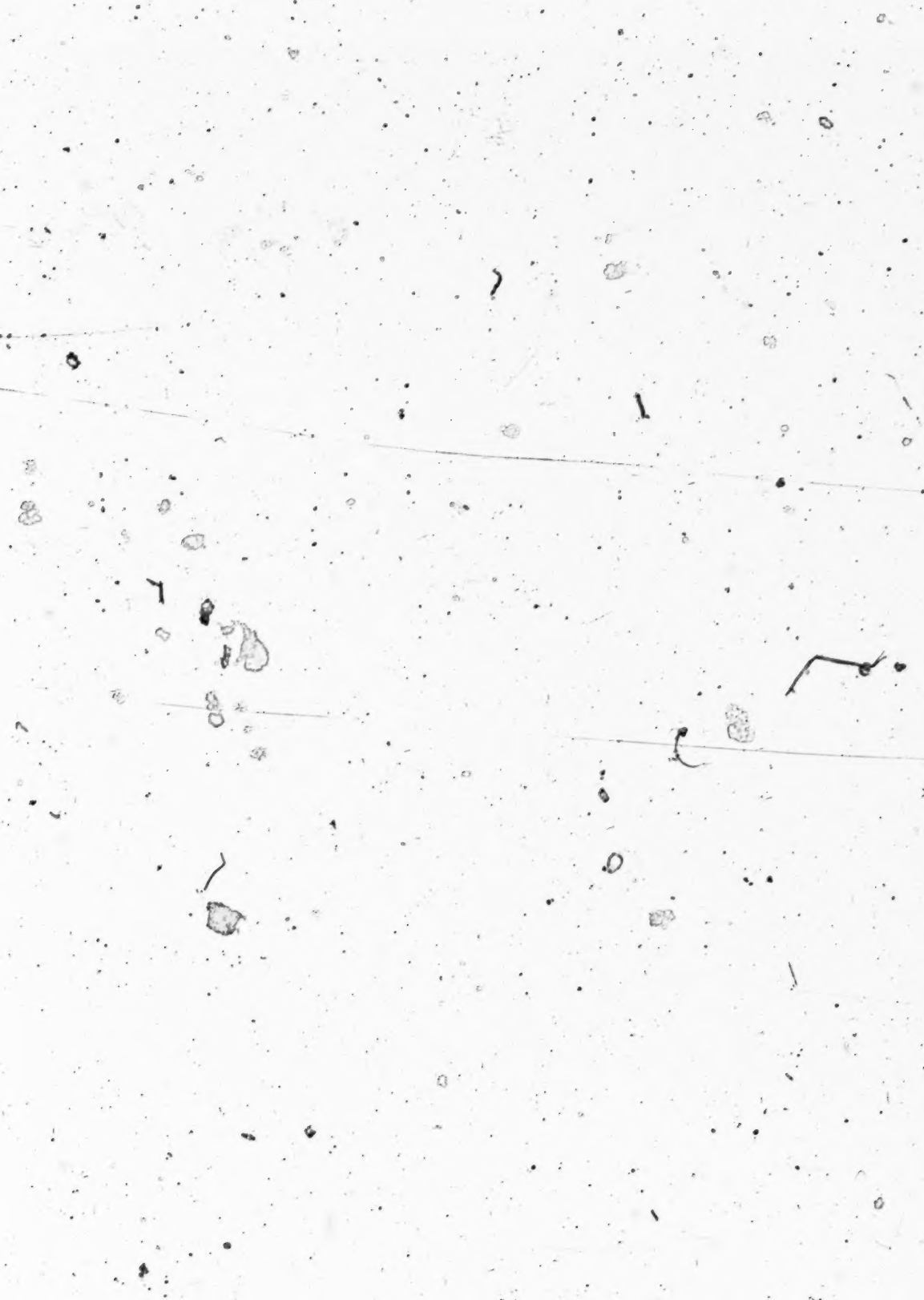
UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

RESPONSE TO THE PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents.



INDEX.

Subject Index.

PAGE

Question presented 2

Statement 3

Reasons for refusing the writ 8

(1) This Court will not take matters under consideration which are not matters of great public concern . . . 8

(2) The Tenth Circuit Court of Appeals was correct in holding that the balance fixed by the District Court for the Western Division of the Western District of Missouri was binding on the District Court in Oklahoma. This holding is not a matter presenting any unsettled question of law.

(A) That the Indian Tribes, by coming into the District Court in Missouri and litigating the counterclaim of the respondents on its merits, waived their immunity is well settled by the decisions of this Court 10

(B) That an Act of the character of Section 18 of the Act of April 26, 1906, in conferring jurisdiction on one court does not thereby confer exclusive jurisdiction is well settled by the decisions of this Court . . . 12

(C) The question raised in this Court not having been raised in the court below must be considered as having been waived and cannot be raised here 16

(3) It is settled by the decisions of this Court that there was no error in rendering judgment in favor of the intervener 18

Conclusion 19

Authorities.

Cases:

Ames v. *Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, 488 15

Atchison, Topeka & Santa Fe Ry. Co. v. *Sowers*, 231 U. S. 54, 58 L. ed. 695 15

PAGE

Bull v. *United States*, 295 U. S. 247, 79 L. ed. 1421 . . 11
DeGroot v. *United States*, 4 Wall. 419-431, 18 L. ed. 700-702 11
Dexter and Carpenter v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705 10
French v. *Gapen*, 105 U. S. 509, 26 L. ed. 951 18
Kenney v. *Supreme Lodge*, 253 U. S. 411, 415, 64 L. ed. 638, 641 15
Luckenbach Steamship Company v. *The Thekla*, 266 U. S. 328, 69 L. ed. 313 10
People of Porto Rico v. *Ramos*, 232 U. S. 627, 58 L. ed. 763 10
Spokane & Inland Empire v. *Whitley*, 237 U. S. 487, 495, 59 L. ed. 1060 15
Tenn. Coal, Iron & Rubber Co. v. *George*, 233 U. S. 354, 360, 58 L. ed. 997, 1000 15
United States v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 80 L. ed. 331, 339 15
United States v. *Eckford*, 6 Wall. 484, 491, 18 L. ed. 920-922 11
United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 857 11
United States of America v. *Missouri-Kansas & Texas R. R. Co.*, 66 Fed. (2d) 919 4
United States v. *Neustra Senoria De Regla*, 108 U. S. 92, 27 L. ed. 662 10
United States v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512 14
United States v. *Ringgold*, 8 Pet. 150, 8 L. ed. 899 . . 11

STATUTES:

Act of June 28, 1898, c. 517, 30 Stat. 495 3
Act of April 26, 1906, c. 1876, 34 Stat. 137, Section 18 . . . . . 2, 8, 12, 13
Act of June 16, 1906, 34 Stat. at L. 267 14
Judicial Code, 28 U. S. C. A. 41 (1), Sec. 24 (1) 12

In the Supreme Court of the United States

No. 569
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, *Petitioner,*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

RESPONSE TO THE PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The United States Fidelity and Guaranty Company, a Corporation, J. M. Bernardin, Trustee of the Central Coal and Coke Company, a Corporation, and the Central Coal and Coke Corporation, a Corporation, respectfully show that a writ of certiorari should not issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered under the date of September

6, 1939, modifying and affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

QUESTION PRESENTED.

Because the question set out in the petition of the United States is much broader than the actual question presented we rephrase that question.

Whether the balance found to be due the counterclaimant in the suit brought by the United States on behalf of the Choctaw-Chickasaw Nations in the District Court in Eastern Oklahoma and transferred by agreement to the District Court in Western Missouri should be re-examined by a District Court in Oklahoma in a subsequent suit, the parties being identical and the same claim and counterclaim having been litigated upon the same evidence, where the action proceeds under Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, in an instance where the force and effect of the adjudication of the merits by the District Court in Western Missouri is first presented by the petition for rehearing after the affirmance of a judgment by the Oklahoma court, giving effect to the determination by the Missouri court. The statute under consideration is as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of

the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits; Provided, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

STATEMENT.

Since the statement contained in the petition of the United States fails, as we see it, to completely put before this Court what took place in the lower courts, we shall reiterate that statement with certain alterations which will be noted in italics.

The Choctaw and Chickasaw Nations, pursuant to authority conferred by the Act of June 28, 1898, c. 517, 30 Stat. 495, executed two separate coal and asphalt leases covering certain tribal lands (R. 119, 45, 50). The United States Fidelity and Guaranty Company became surety on the bond given by the lessee for the faithful performance of its obligations contained in the leases (R. 119, 54-56). The Central Coal and Coke Company, a corporation, organized under the laws of Missouri, acquired the leases

by assignment with the consent of the surety (R. 119, 33-34). The leases provided for payment of advance royalties and deficit royalties (R. 47, 52), *contrary to governing statute as to deficit royalties. United States of America v. Missouri-Kansas & Texas R. R. Co.*, 66 Fed. (2d) 919.

The Central Coal and Coke Company was placed in equity receivership in the United States District Court for the Western District of Missouri (R. 120). *Acting on behalf of the Choctaw and Chickasaw Nations the United States in 1931 filed a claim in an ancillary proceeding in the United States District Court for the Eastern District of Oklahoma, for advance and deficit royalties, totalling $4800.00. Thereafter it was agreed by the parties that the claim filed in the United States District Court for the Eastern District of Oklahoma should be considered as filed in the principal case in the United States Court for the Western District of Missouri* (R. 120, 34-35).

Thereafter a petition in bankruptcy under Section 77-B of the Bankruptcy Act was filed on behalf of the Central Coal and Coke Company.

In 1935 the trustee, appointed pursuant to Section 77-B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26-28, 36-42). *The matter was heard on its merits* (R. 34-44, 56-103). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim to the extent of $11,060.90 (R. 121, 56-55). The court denied exceptions to the report and entered judgment that the United States on behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner pro-

vided by law (R. 121, 66-67). No appeal was taken from that judgment (R. 122).

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf and for the Choctaw and Chickasaw Nations filed suit in the federal District Court for the Eastern District of Oklahoma against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties (R. 11-16). The trustee of the Central Coal and Coke Corporation and its predecessor, the Central Coal and Coke Company, by leave of court (R. 29), *without objection or exception* (R. 29), intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and also pleaded the judgment rendered in that court (R. 24-26). The surety company by amended answer followed the allegations contained in the petition in intervention (R. 16-18). By way of answer and reply the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim, *upon the sole ground that no claim for credit had been presented to the General Accounting Office and by it disallowed* (R. 21-22, 31-32).

At the trial of the case the attorneys for the United States conceded that in the event the judgment of the United States Court for the Western District of Missouri was a valid judgment the United States was not entitled to recover in this action (R. 123). *It appeared at the trial that the same parties appeared as appeared in the Missouri court and that the parties were represented by the same attorneys in both courts* (R. 128), *the same evidence was*

before the District Court in Oklahoma as was before the District Court in Missouri (R. 44).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject-matter of the claim and counterclaim; that the *finding made* therein was valid and not subject to collateral attack *on the ground that no claim was proved to have been filed with the General Accounting Office and by it disallowed* prior to the findings on the counterclaim (R. 123-125, Conclusions of Law) (R. 130-132, Opinion); and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90, with interest and costs *to be secured and collected in the manner provided by law* (R. 134).

The United States appealed to the Circuit Court of Appeals for the Tenth Circuit. In that court the United States abandoned the ground presented to the trial court, that the judgment of the District Court in Missouri was void because no claim had been presented to the General Accounting Office and by it disallowed. In the Circuit Court of Appeals so far as the matter is involved here the United States maintained that the District Court in Missouri lacked jurisdiction to hear the controversy at all under the terms of the Act of April 26, 1906, which the United States now conceded to be the governing statute (R. 145-148). *Likewise the United States contended that if the District Court of Missouri had jurisdiction to hear the controversy it had no jurisdiction to determine what might be due the counterclaimants from the Indian tribes* (R. 148).

The judgment of the District Court, except as to interest and costs, was affirmed by the Circuit Court of Appeals. That court held, *inter alia: (1)* that "the Choctaw

and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized"; *(2)* that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and *(3)* that this determination of the balance due the Central Coal and Coke Corporation was binding on the court in Oklahoma.

After the opinion of the Circuit Court of Appeals had been handed down the United States filed a petition for rehearing, in which it abandoned the grounds theretofore set up, and upon which the opinion was based, and conceded that the District Court for the Western District of Missouri had jurisdiction of the parties and the subject-matter of the claim and counterclaim and had jurisdiction to determine the amount which was due from the Indian tribes to the counter-claimant (Petition for Rehearing, page 5), *but that it was error for the United States Court for the Eastern District of Oklahoma not to have re-examined the counterclaim on its merits* (Petition for Rehearing, page 6). *This petition was denied November 8, 1939.*

The Circuit Court of Appeals was reviewing the action of the District Court in Oklahoma in a proceeding which was litigated between the same parties by the same attorneys, upon the same claim and counterclaim, and upon the same evidence as had been the controversy in the District Court in Missouri. Nowhere in the record, nor in the petition in this Court for writ of certiorari does any state-

ment appear that had the claim been re-examined by the trial court or by the Circuit Court of Appeals a different judgment would have resulted.

REASONS FOR REFUSING THE WRIT.

The matter raised by the United States as a reason for granting this writ is the question of the ability of the United States District Court sitting in Missouri to make a finding of the amount due a counter-claimant against the Choctaw and Chickasaw Nations in a suit brought by the United States on behalf of those Nations. It is asserted by the United States at this point that the question is governed solely by Section 18 of the Act of April 26, 1906. Not until after the matter was tried on its merits in the United States Court for the Western District of Missouri, re-tried in the United States Court for the Eastern District of Oklahoma, and appealed to the United States Circuit Court of Appeals for the Tenth Circuit, and in each instance lost by the United States, was the question sought to be presented here ever raised.

Before considering the correctness of the decision of the United States Circuit Court of Appeals for the Tenth Circuit in this cause we submit that the controversy herein is not such a matter as this Court is wont to review.

(1) This Court will not take matters under consideration which are not matters of great public concern.

The sole controversy that can exist in this case is whether the last clause of Section 18 of the Act of April 26, 1906, 34 Stat. can be so read as to constitute the United States courts for the Indian Territory, and their successors, United States courts for Oklahoma, the only courts

that can render a finding on which the treasurer of the United States could pay out funds of the Indian tribes. This is a matter of small concern. The Act was passed in April of 1906. More than thirty-three years have elapsed since that time. A complete review of the authorities fails to disclose any case in which the Act has been interpreted as to the counterclaim feature. There are no reported decisions. (A search by the United States government and by these respondents has failed to disclose where any case has ever been filed in the United States court for Oklahoma involving this feature.) Accordingly, it appears that in the thirty-three years since the passage of the Act this is the first case in which the effect of these counterclaim provisions has arisen. The affairs of the Five Civilized Tribes are not as multitudinous now as in the past and the probability of these questions arising in the future is a great deal less than was the probability of their arising in the past. Accordingly, this case involves no matter of great public concern. This court will not take matters under consideration which are not matters of great public concern.

We turn to the consideration of the alleged errors. Of the two errors set out in the petition of the United States only one is discussed.

(2) The Tenth Circuit Court of Appeals was correct in holding that the balance fixed by the District Court for the Western Division of the Western District of Missouri was binding on the District Court in Oklahoma. This holding is not a matter presenting any unsettled question of law.

(A) *That the Indian Tribes, by coming into the District Court in Missouri and litigating the counterclaim of the respondents on its merits, waived their immunity is well settled by the decisions of this Court.*

It is true that the Indian Tribes are sovereigns and immune from suit except when expressly authorized. It is likewise true that a sovereign by coming into court does not subject itself to affirmative liability on a counterclaim. The Indian tribes occupy a position that is most nearly akin to that of a foreign sovereign. Sovereign immunity may be waived when the sovereign contests the counterclaim without pleading immunity, and under such circumstances the sovereign is subject to the judgment on that counterclaim. *Luckenbach Steamship Company* v. *The Thekla*, 266 U. S. 328, 69 L. ed. 313; *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92, 27 L. ed. 662; *People of Porto Rico* v. *Ramos*, 232 U. S. 627, 58 L. ed. 763; *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705.

In the case of *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen, supra*, prior decisions of which had been twice affirmed by this Court, the court said at page 707:

> "But, where a sovereign invokes the jurisdiction of the court, appears voluntarily, and pleads to a counterclaim interposed, contesting the merits of the respective claims until judgment is rendered against it, the court has jurisdiction, and there is both a waiver of immunity and a consent to the exercise of the jurisdiction."

Under the general law the District Court in Missouri, having acquired jurisdiction of the parties and of the subject-matter, which is admitted by the United States at this time (Petition for Writ of Certiorari, page 5), it had authority to render a judgment or at least make a finding of the amount due.

Even when the United States is the opposing sovereign the court may pass on the merits of a private litigant's defense where, as in the instant case, the matter involved is a claim and counterclaim arising out of the same transaction. *United States* v. *McDaniel*, 7 Pet. 1, 8 L. ed. 857; *United States* v. *Ringgold*, 8 Pet. 150, 8 L. ed. 899; *Bull* v. *United States*, 295 U. S. 247, 79 L. ed. 1421. And if the amount of the counterclaims exceeds the amount of the sovereign's claim the court may determine what amount is due from the sovereign to the counter-claimant. *DeGroot* v. *United States*, 4 Wall. 419-431, 18 L. ed. 700-702; *United States* v. *Eckford*, 6 Wall. 484, 491, 18 L. ed. 920-922.

It is therefore settled law that the United States court for the Western District of Missouri had jurisdiction to render an affirmative finding against the Indian Tribes. That is all that it did do. It is not contended by the United States that this finding would not be a binding adjudication on another United States court, but it is attempted to show that the Act of April 26, 1906, constituted the United States courts for the Indian Territory, and their successors, the United States courts for Oklahoma, a sort of court of claims with regard to claims by and against the Indian tribes. Unless then the United States courts for the Indian Territory, and their successors, United States courts for Oklahoma, are vested with exclusive jurisdiction to render affirmative findings against the Indian tribes the decision of the court below was correct, without going further.

(B) *That an Act of the character of Section 18 of the Act of April 26, 1906, in conferring jurisdiction on one court does not thereby confer exclusive jurisdiction is well settled by the decisions of this Court.*

The Act, Section 18 thereof authorized the Secretary of the Interior to bring suit in the name of the United States, for the use of the Choctaw and Chickasaw Tribes for the collection of any moneys claimed by said Tribes in any of the District Courts of the United States where the party against whom relief was sought may be found. The section further waives immunity of said tribes from counterclaim by defendants in any such proceedings and authorizes an affirmative finding against such Tribes. The jurisdiction to hear suits and counterclaims therein brought by the Secretary of the Interior, in the name of the United States, for moneys claimed by the Choctaw and Chickasaw Tribes is not limited to the United States Territorial Courts of Indian Territory or their successor courts as psuedo courts of claims.

It is well settled that "The United States as guardian of Indian tribes or individual Indians may institute appropriate suits or proceedings for the enforcement of the rights or the protection of the property of its Indian wards"; and the Attorney General of the United States is authorized and empowered to institute or cause to be instituted and thereafter to prosecute all suits or proceedings deemed necessary to safeguard or enforce the rights of the Indian wards. This right necessarily includes the duty of instituting such actions as might be necessary or convenient for the protection of tribal rights in any of the District Courts of the United States, and which courts have general jurisdiction of all actions in which the United States is a party under Sec. 24 (1) of the Judicial Code,

28 U.S.C.A. 41 (1). (Opinion of the Circuit Court of Appeals, R. 145, 146, and authorities therein cited.)

Such was the law at the time of the passage of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and there was at that time in the Attorney General of the United States the right to institute and prosecute such action as might be necessary or convenient in any of the District Courts of the United States.

Section 18 of the Act of April 26, 1906, gave to the Secretary of the Interior a similar right in so far as the Five Civilized Tribes might be concerned by providing:

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land, whether such claim shall arise prior to or after the dissolution of the tribal governments, * * *."

By the use of the above quoted language it was the intent and purpose of Congress to give to the Secretary of the Interior the same right and broad powers to institute a suit in the name of the United States for any of the Five Civilized Tribes, in the appropriate District Court of the United States as were vested in the Attorney General of the United States. As in the case of the Attorney General, it imposed the duty of instituting such action in any District Court where the party against whom the relief was sought might be found. By virtue of this authority and under the imposed duty of the statute the Secretary of the Interior caused to be instituted the proceeding or action in the United States District Court for the Western Division of the Western District of Missouri, and it was stip-

ulated that such proceeding was "under and pursuant to the authority issuing from the Secretary of the Interior and approved by the Attorney General." (R. 89).

The action was a transitory one and was properly brought in the district in which the Central Coal and Coke Company was resident and where relief might be secured. (Opinion of the Circuit Court of Appeals, R. 146.)

This authority of the Secretary of the Interior and the jurisdiction of the United States District Courts was not limited by the additional wording of the section which reads:

> "And the United States courts in the Indian Territory are hereby given jurisdiction to try and determine all such suits."

The purpose of the Act was to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory (34 Stat. 137). At the time of its enactment there was pending before Congress the Enabling Act, authorizing the creation of the State of Oklahoma, and it was known by Congress that statehood was imminent. Act of June 16, 1906, 34 Stat. at L. 267; *United States* v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512.

The prior enactments fixing the jurisdiction of the Territorial courts of the Indian Territory probably gave to the United States the right to bring actions in said courts in behalf of its Indian wards. However, the matter was not entirely free from doubt; and as the jurisdiction of such Territorial courts was purely statutory it is not unreasonable to assume that Congress thought best to remove all doubt by giving jurisdiction to such courts. *United States* v. *Rea-Read Mill & Elev. Co.*, 171 Fed. 501, 512.

The granting of such jurisdiction to the Territorial Courts does not imply that that jurisdiction is to be exclusive or that the general authority given to the Secretary of the Interior is restricted to such court. (Opinion of Circuit Court of Appeals R. 145.) *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, 80 L. ed. 331, 339; *Ames* v. *Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, 488.

The act provides that the Secretary of the Interior might bring an action in behalf of any of the Five Civilized Tribes "for the collection of any moneys", which action is a transitory one; and ordinarily the designation of the court in which such action may be brought even though it creates a new right not theretofore existing does not limit the jurisdiction or the authority of other courts to recognize said right or grant relief by virtue thereof. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 231 U. S. 54, 53 L. ed. 695; *Tenn. Coal, Iron & Rubber Co.* v. *George*, 233 U. S. 354, 360, 58 L. ed. 997, 1000; *Kenney* v. *Supreme Lodge*, 253 U. S. 411, 415, 64 L. ed. 638, 641; *Spokane & Inland Empire* v. *Whitley*, 237 U. S. 487, 495, 59 L. ed. 1060.

We conclude that the Secretary of the Interior did, in the name of the United States, institute a proceeding in the Missouri court and had authority so to do, and that such court had jurisdiction of the parties and of the subject-matter.

The immunity of the Tribes from counterclaim was waived by Section 18 of the said Act, which provided that "party defendant in such suit shall have the right to set up and have adjudicated any claim it may have against such Tribe." It is true that the language of the said paragraph also provides "that where suit is pending in United

States courts of the Indian Territory" that such counterclaim may be asserted. However, the Act contemplated the winding up of the affairs of the tribes and its broad purpose and object was to allow not only the prosecution of suits for the benefit of the Tribes in the District Courts of the United States wherever it might be convenient or necessary but also to allow counterclaims therein. The right to assert counterclaim is an inseparable part of the section; and it was the intent and purpose of Congress to permit a complete adjudication of the claims of the parties, and the securing of an affirmative judgment against the Tribes, wherever the suit might be brought.

(C) *The question raised in this Court not having been raised in the court below must be considered as having been waived and cannot be raised here.*

At no time prior to the filing of the petition for rehearing did the United States object to the trial court's refraining from passing on the merits. The reply (R. 21-22) and the answer (R. 31-32) of the United States for the Tribes is grounded on the alleged lack of jurisdiction of the Missouri court to hear the case because no claim had been filed with the General Accounting Office and disallowed prior to the proceeding in Missouri. The Findings of Fact (R. 123) and Conclusions of Law (R. 123-125) and the Opinion (R. 130-132) show that this was the sole contested ground. After the judgment of the trial court the United States filed assignments of error (R. 135-137). In none of these is there any complaint of error in not re-examining the matter on its merits. The only assignment complaining of the effect given the finding of the court in Missouri as to the counterclaim is Assignment No. 8, which complains that that finding was "wholly void and contrary to the evidence and law." (R. 137). Then, so far as the trial

of the case is concerned, the record reflects that no complaint was made as to the court's not having re-examined the merits. The inference appears that the United States claimed no defense as to the merits.

Turning to the appeal we find that none of the designated points raised the question that the lower court should have re-examined the merits of the counterclaim. By point No. 3 (R. 1, 2) the United States complains of the trial court's giving any effect to the finding of the District Court in Missouri because it was "void for want of jurisdiction." It argued that under Section 18 of the Act of April 26, 1906, the Missouri court lacked jurisdiction of the parties and the subject-matter, both as to the claim and counterclaim, and abandoned the ground of the necessity of filing the counterclaim with the General Accounting Office. The Circuit Court of Appeals held that the federal court in Missouri had jurisdiction to do everything that it did (R. 147-148).

In its petition for rehearing the United States conceded that this holding was correct for the purpose of the petition. (Petition for rehearing, page 5.) This concession is carried on into the petition for writ of certiorari filed in this Court.

After an adverse decision the United States presented by petition for rehearing the new ground that the trial court should have re-examined the counterclaim on its merits. Nothing in the designated points raised this question. The designation of points on which an appellant intends to rely does not serve the identical purpose as did the assignments of error, and if the record, as brought before the appellate court, is sufficient to cover any new point it may properly be considered. However, there must be

some place, even under the relaxed rules of procedure, where an appellant is precluded from raising questions which were not raised in the court below and, accordingly, could not have been the basis of the decision of which such appellant complains.

We now consider the second assignment of error.

(3) It is settled by the decisions of this Court that there was no error in rendering judgment in favor of the intervener.

The petition of the United States assigns as error but does not discuss the action of the Circuit Court of Appeals in holding that the Court in Oklahoma had jurisdiction to render an affirmative judgment in favor of an "intervener". It is settled law, in this Court, that an intervener coming into a case without objections should be treated for all intents and purposes as though it had been made a party defendant and had set up its matters in defense by way of counterclaim. *French* v. *Gapen*, 105 U. S. 509, 26 L. ed. 951. And was so found by the court below, 106 Fed. (2d) 804, 810.

Conclusion.

This case presents the novel situation that it was first heard on the merits. Ever since that time the United States has been insisting that the various courts did not have the right to consider the matter on its merits, but now complains of their failure to reconsider the merits as grounds for obtaining a review by this Court.

Briefly, in summation, this matter was considered on its merits by a special master appointed by the United States court for the Western District of Missouri, to which court the controversy had been removed from Oklahoma by agreement of the parties; the United States excepted to the findings of the master and these findings were confirmed by the judge of the court. The United States did not appeal, but proceeded to litigate in the United States court in Oklahoma the right of the surety to avail itself of the defenses of its principal, maintaining that the judgment in the Missouri court was void because the claim of the principal had not been presented to the General Accounting Office and disallowed prior to the proceeding in Missouri. On appeal from an adverse decision the United States abandoned this ground and maintained that the Act of April 26, 1906, which it had previously argued had no bearing on the case, was controlling and precluded the Missouri court from passing on the matter, both as to the claim and counterclaim. Again, on this question, there was an adverse ruling. The United States then conceded that the Missouri court did have jurisdiction to pass on the claim and counterclaim but maintains that the Oklahoma court should have re-examined the merits of the controversy.

We have shown that this is a matter of little import; that any claim to immunity by the Tribes was waived; that

the Act of April 26, 1906, did not confer exclusive jurisdiction; that the question as to the necessity of the trial court's re-examining the merits was waived.

Finally, the same evidence was presented to the trial court in this case as was presented to the District Court in Missouri. It is not contended by the United States in its petition for rehearing in the Circuit Court of Appeals, nor by its petition for writ of certiorari in this court that a re-examination of that evidence by the trial court would have, or could have, resulted in any other decision than that which was made in the District Court in Missouri.

We respectfully submit that the petition of the United States for writ of certiorari should be denied.

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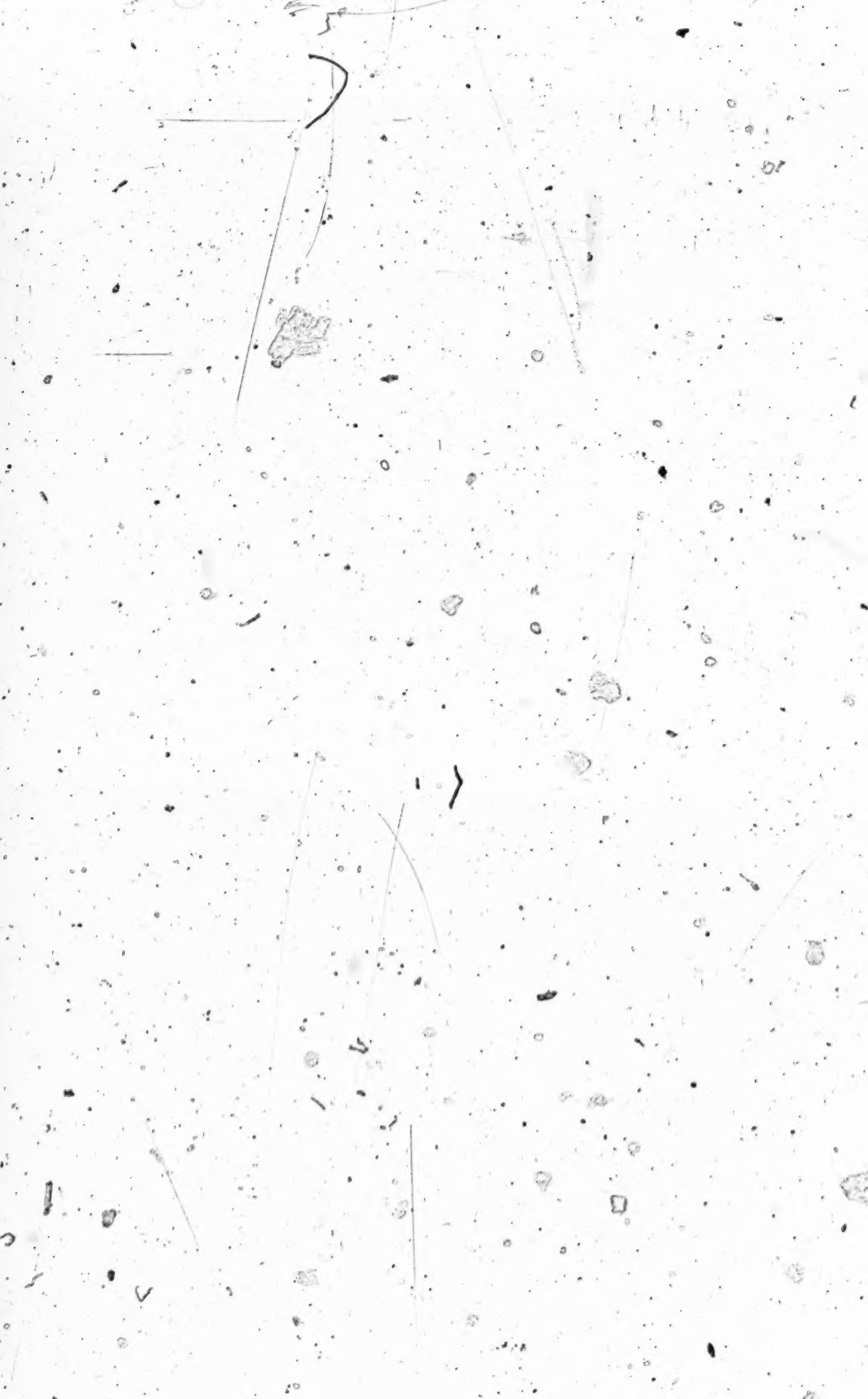
Attorneys for Respondents.



FILE COPY

In the Supreme Court of the United States

No. 569, October Term, 1939

UNITED STATES OF AMERICA, *Petitioner,*

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

Brief for the United States Fidelity and Guaranty Company; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents, United States Fidelity and Guaranty Company, a Corporation; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation, a Corporation.

INDEX.

PAGE

Statutes and regulations of Secretary of the Interior involved 1

Additional statement 2

Advance royalty credit 3

Statutory credits by reason of the purchase of the segregated coal deposit 5

Minimum tonnage and deficit royalty credit 6

Summary of argument 9

Argument:

I.

The judgment of the United States Court in Missouri was binding in the Oklahoma suit 16

A. There was no judgment against the United States 17

B. The United States Court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes.

1. Such jurisdiction was conferred by Sec. 18 of the Act of April 26, 1906, c. 1876 (34 Stat. 137, 144), when considered with the applicable statutes conferring jurisdiction in the District Courts of the United States 17

2. Congress has consented to an affirmative judgment against the Tribes, and any right to have such claim asserted in the federal courts of Oklahoma was waived by the United States and the Tribes by contesting such claim in the federal court in Missouri . . 25

3. The determination of the question of jurisdiction by the federal court in Missouri may not be assailed collaterally 27

4. The Tribes as now constituted are not sovereigns immune from suit 28

5. The defense of sovereign immunity was waived . . . 31

C. As the United States Court in Missouri had jurisdiction its judgment was binding in the Oklahoma suit..... 32

Counter Proposition.

The error, if any, was failure of the trial court to re-examine the merits of the claim of the respondent, Central Coal and Coke Company, upon the uncontradicted evidence before it, and as the court was invited and induced not to consider such evidence, by the petitioner, it cannot now complain..... 37

II.

The interveners came into this case as party defendants, without objection, and their claim was properly allowed under the Act of April 26, 1906..... 38

Conclusion..... 41

Appendix..... 42

CITATIONS.

Cases

Barrett v. *Van Pelt*, 268 U. S. 85, 90.....11, 22
Bechtel v. *United States*, 101 U. S. 597, 600..... 18
Becker v. *Northway*, 44 Minn. 61..... 39
Benton v. *Safe Deposit Bank*, 255 N. Y. 260..... 24
Beley v. *Naphtaly*, 169 U. S. 353, 359-60.....9, 18
Boudinot v. *Locust*, 55 Okl. 662..... 34
Bull v. *United States*, 295 U. S. 247..... 21
Cause v. *United States*, 240 U. S. 399..... 19
Chappell v. *United States*, 81 Fed. 764..... 19
Cherokee Nation v. *Georgia*, 5 Peters 1, 16.....13, 31
Chicot County Drainage Dist. v. *Baxter State Bank*, No. 102 decided by the Supreme Court Jan. 2, 1940...12, 27
Church of Holy Trinity v. *United States*, 143 U. S. 457, 459..... 24
Clark v. *Barnard*, 108 U. S. 436, 447.....13, 31, 32
Cole v. *Ralph*, 252 U. S. 286..... 41
Continental Illinois Bank & Trust Co. v. *C. R. I. & P. R. R. Co.*, 294 U. S. 648.....11, 24
Converse v. *United States*, 21 How. 463..... 19
Cramer v. *United States*, 261 U. S. 219..... 19

Cases—Continued PAGE

Dante & Russell v. *Halsbad Lumber Co.*, 103 Fed. (2d) 306 38
Dexter and Carpenter v. *Kunglig Jarnvagstyrelsen*, 43 Fed. (2d) 705 . . . . . 28, 29, 31, 32, 35
Fidelity Insurance, Trust and Safe Deposit Co. v. *Mechanics' Bank*, 97 Fed. (3 C. C. A.) 297-303 . . . . . 11, 24
First National Bank v. *County of Yankton*, 101 U. S. 129, 133 23
Fleischman C. Co. v. *United States*, 270 U. S. 349, 360 . . . . . 11, 22, 24
Folk v. *United States*, 233 Fed 177 . . . . . 9, 13, 17, 25, 28, 33
French v. *Gapen*, 105 U. S. 509, 525 . . . . . 15, 41
French Republic v. *Inland Navigation Co.*, 263 Fed. 410 . . . . . 12, 28
Garner v. *Riddle*, 140 Okl. 70 . . . . . 15, 41
The Gloria, 296 Fed. 188 . . . . . 28, 33, 35
Guaranty Trust Co. v. *United States*, 304 U. S. 126 35
Hansen v. *Boyd*, 161 U. S. 397, 411 38
Hawaii v. *Mankichi*, 190 U. S. 197, 212 . . . . . 22, 24
Heckman v. *United States*, 224 U. S. 413 . . . . . 10, 19
Heydenfelt v. *Dayney, etc., Mining Co.*, 93 U. S. 634 11
Illinois Cent. R. R. Co. v. *Public Utilities Comm.*, 245 U. S. 493, 504 26
Illinois Steel Co. v. *Ramsey*, 176 Fed. 853 41
In re: Greyling Realty Corp., 74 Fed. (2d) 734 24
Kawananakoa v. *Polyblank*, 205 U. S. 349 . . . . . 12, 28, 31
Knowlton v. *Moore*, 178 U. S. 41, 65 17
Koenigsberger v. *Richmond Silver Mining Co.*, 158 U. S. 41, 52 38
Kohsaat v. *Murphy*, 6 Otto 153, 160 17
LaMotte v. *United States*, 224 U. S. 413 . . . . . 10, 17, 19
Law v. *United States*, 266 U. S. 494, 496 38
Mars v. *McDougal*, 40 Fed. (2d) 247 19
Moore v. *New York Cotton Exchange*, 270 U. S. 593, 609 . . . . . 11, 15, 24, 39
The Newbattle, 10 Prob. Div. 33, 5 Aspinall Maritim Cases, N. S. 356 35
New York Elevated Railroad Co. v. *The Fifth National Bank*, 135 U. S. 432, 441, 442 . . . . . 15, 38

Cases—Continued PAGE

Northern Pacific R. R. Co. v. *Babcock*, 154 U. S. 190, 197 23
Orinoco Co., Ltd., v. *Orinoco Iron Co.*, 296 Fed. 965, 972 . . . . . 13, 31
The Paquete Habana, 189 U. S. 453 35
People of Porto Rico v. *Ramos*, 232 U. S. 627 . . . . . 28, 32
Peoria & Pekin R. R. Co. v. *United States*, 263 U. S. 528, 535 . . . . . 12, 26
Perry v. *Godbe*, 82 Fed. 141 41
Pickett v. *United States*, 216 U. S. 456, 460 24
Pueblo Picuris v. *Abeyta*, 50 Fed. (2d) 12 19
Puerto Rico v. *Shell Co.*, 302 U. S. 253, 258 17
Richardson, Treasurer of Porto Rico, v. *Fajardo Sugar Co.*, 241 U. S. 44 . . . . . 12, 13, 26, 27, 32
Robertson v. *Railway Labor Board*, 268 U. S. 619, 622, 623 21
Rocca v. *Thompson*, 223 U. S. 317 . . . . . 15, 39
Russia v. *Banker's Trust Co.*, 4 Fed. Sup. 417 35
448 . . . . . 11, 23
The Sao Vicente, 295 Fed. 829, 831 . . . . . 13, 31, 32
The Sao Vicente, 281 Fed. 111, certiorari dismissed, 260 U. S. 151 32
Stevens v. *Cherokee Nation*, 174 U. S. 445 31
Stewart v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445,
Stoll v. *Gottlieb*, 305 U. S. 165 27
Stone v. *United States*, 167 U. S. 178, 182 21
Stratford Arms Hotel v. *General Casualty Company*, 249 Mich. 518, 229 N. W. 506 . . . . . 15, 38
Texas Pacific R. R. Co. v. *Cox*, 145 U. S. 593 . . . . . 11, 23
The Thekla, 266 U. S. 328 . . . . . 14, 35
Tiger v. *Twin State Oil Co.*, 48 Fed. (2d) 509 19
Tiger v. *Western Inv. Co.*, 221 U. S. 286, 306 19
United States v. *Algoma Lumber Co.*, 305 U. S. 415 . . . . . 9, 13, 17, 27, 31, 33
United States v. *Bank of New York and Trust Co.*, 296 U. S. 463 . . . . . 10, 21, 23
United States v. *Eckford*, 6 Wall. 484 . . . . . 13, 33, 34
United States v. *Ft. Smith and Western Railway Co.*, 195 Fed. 211 . . . . . 17, 33

Cases—Continued PAGE

United States v. *Mann*, 26 Fed. Cases, p. 1159, case No. 15716. . . . . 23, 25
United States v. *McDaniel*, 7 Peters 1. 21
United States for the use of the Choctaw and Chickasaw Nations v. *McMurray*, 181 Fed. 723. 7
United States v. *Minnesota*, 270 U. S. 181. 19
United States v. *M. K. & T. Ry. Co.*, 66 Fed. (2d) 919; *United States* v. *Eastern Coal Company*, 66 Fed. (2d) 923. 7
United States v. *National City Bank of New York*, 83 Fed. (2d) 236. 24
United States v. *Neustra Senoria De Regla*, 108 U. S. 92. . . . . 14, 35
United States v. *New Orleans & Pac. Ry.*, 248 U. S. 507. . 19
United States v. *Noble*, 237 U. S. 74. 19
United States v. *Osage County*, 251 U. S. 128. 19
United States v. *Pan-American Pet. Co.*, 6 Fed. (2d) 43, 83. 18
United States v. *Rea-Reed Mill & Elevator Co.*, 171 Fed. 501, 511. 23
United States v. *San Jacinto Tin Co.*, 125 U. S. 273. . . . 19
United States v. *Shaw*, No. 570, this term. 14, 34
United States v. *Throckmorton*, 98 U. S. 61. . . . . 10, 19
United States v. *U. S. Fidelity & Guaranty*, 106 Fed. (2d) 804, 809. 21
Vermont Bank v. *Porter*, 5 Day 157. . . . . 11, 24
Wallace v. *Adams*, 143 Fed. 716. 23
White v. *Ewing*, 159 U. S. 36, 38. . . . . 11, 24
Wycoff v. *Epworth Hotel Const. Co.*, 146 Mo. App. 554. . . . . 14, 36

STATUTES.

PAGE

Act of March 3, 1797, c. 20, Sec. 3, 1 Stat. 514, 28 U.S. C.A. §774 8

Act of March 3, 1871, c. 120, 16 Stat. 566 29

Act of June 7, 1897, c. 3, 30 Stat. 62, 83 29

Act of March 3, 1901, c. 868, 31 Stat. 1447 29

Act of July 1, 1902, c. 1362, 32 Stat. 641 29

Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, Secs. 11 and 18 ..... 1, 9, 12, 15, 17, 18, 19, 21, 22, 25, 26, 27, 30, 34, 41

Act of October 22, 1913, c. 32, 38 Stat. 219 26

Act of February 8, 1918, c. 12, 40 Stat. 433, Sec. 4 ..... 2, 3, 5, 6, 33

Atoka Agreement, Sec. 13, approved by Act of June 28, 1898, c. 517 ..... 1, 3, 29

Bankruptcy Act, Section 77-b 2, 11, 24, 25

Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, 510, Sec. 29 ..... 1, 5, 6, 33

31 Stat. 141, Sec. 11 18

28 U. S. C. §41-(1), Section 24 (1) of the Judicial Code 2, 10, 14, 20, 21, 25, 33

MISCELLANEOUS.

Black's Law Dictionary, 2nd Ed., pp. 651-652 ..... 15, 38

Dobie on Federal Procedure, 601 41

Equity Rule 30 ..... 2, 11, 14, 15, 24, 25, 33

Equity Rule 37 40

Moore Federal Practice, Sec. 24. 03 41

Regulation of the Secretary of the Interior promulgated December 6, 1907 ..... 2, 6

Regulation of the Secretary of the Interior promulgated September 24, 1918, Secs. 12 and 13 ..... 2, 4

In the Supreme Court of the United States

No. 569

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, *Petitioner,*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief for the United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation.

Statutes and Regulations of Secretary of the Interior Involved.

Sections 11 and 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, providing for settlement of claims against the Choctaw and Chickasaw Nations.

Section 13 of the Atoka Agreement, a treaty between the United States and the Choctaw and Chickasaw Tribes, approved by the Act of June 28, 1898, c. 517.

Section 29, 30 Stat. 495, 510, The Curtis Act, fixing the royalty upon leases executed by the Mining Trustees of the Tribes, and providing under certain conditions that

advance royalty paid could be used to pay royalty on coal subsequently mined.

Section 4 of the Act of February 8, 1918, c. 12, 40 Stat. 433, providing for the sale of the segregated coal deposits of the Choctaw and Chickasaw Tribes, that the sale should not affect the rights of the lessees with royalty credits where deposits underlying lessee's premises were sold, and where the lessee of undeveloped leases purchased coal deposits underlying the same one-half of the advance royalty credit could be used by such lessees to pay the royalty on coal mined and operated on other leases of the lessee. (See Appendix.)

Sections 12 and 13 of the Regulation of the Secretary of the Interior promulgated September 24, 1918, recognizing and providing for the protection of the right of the lessee upon the sale of segregated coal deposits underlying the leases as contemplated by §4 of the Act of February 8, 1918. (See Appendix.)

Regulation of the Secretary of the Interior promulgated December 6, 1907, increasing royalty required to be paid for failure to mine and in excess of the requirement of §13 of the Atoka Agreement. (See Appendix.)

Section 24 (1) of the Judicial Code; 28 U. S. C. §41-(1).

Section 77-b of the Bankruptcy Act.

Equity Rule 30.

ADDITIONAL STATEMENT.

The statement of the petitioner omits certain facts which should be considered.

Reference is made by petitioner to certain coal leases of segregated coal lands of the Choctaw and Chickasaw Tribes, authorized to be made by the Mining Trustees of the Tribes, under the Atoka Agreement approved by the

Act of June 28, 1898, c. 517, §29, 30 Stat. 495, 510. All four leases were covered by one bond (R. 31.)

Advance Royalty Credit.

The Atoka Agreement, Section 13 thereof, 30 Stat. 510, fixed the requirement as to royalty to be paid on the failure to mine and provided that for the fifth year, and each year thereafter, $500.00 should be paid as advance royalty. Under the terms of the Act, and of the leases, such advanced royalties paid could be used for the payment of coal subsequently mined, and should any advanced royalty credit be not used in the year for which it was paid, then it could be used for any subsequent year where coal was mined and paid for in such subsequent year in excess of the yearly advanced royalty payment for that year.

For convenience the leases were designated Lease No. 1, No. 2, No. 3 and No. 4; Leases No. 1 and No. 2 being the ones upon which claim was filed in the District Court for the Western District of Missouri, and upon which this action was filed, the defendant surety company having, under the terms of its bond, agreed to pay the rentals and royalty due under the leases.

Congress authorized the sale of such deposits and provided that such deposits on leased land should be sold, subject to all rights of the lessee, and that advance royalty paid by any lessee and standing to the credit of said lessee should be credited by said purchaser to the amount thereof, and that no royalty should be paid by the lessee until the credit so given should be exhausted. (Sec. 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433).)

Coal deposits underlying Leases No. 1 and No. 2 were conditionally sold on June 17, 1920, to the Carbon Coal Company (R. 64-69.). At the time of this sale there was to the credit of the Central Coal and Coke Company

on Lease No. 1, by reason of having paid advance royalty in excess of coal actually mined in the sum of $773.52 (R. 65), and upon Lease No. 2 in the sum of $773.28 (R. 68). In subsequent years that Company mined coal and paid royalty thereupon to the Government for the tribes, on each of said leases, in excess of the annual royalty requirement and were entitled to the use of the credit to the respective leases. Until final payment was made for any tract of coal deposits conditionally sold all mining operations were required to be under supervision of the representative of the Bureau of Mines and the Mining Trustees of the Tribes, or such other officer as the Commissioner of Indian Affairs might designate (Sec. 12 Rules and Regulations of Secretary of Interior of Sep. 24th, 1918.) (R. 67); and under Section 13 of such Regulations the purchaser was required to pay royalty, on coal mined, to the Superintendent of the Five Civilized Tribes and such payment was to be held and applied on the purchase price (R. 67). In administering these regulations the Secretary of the Interior required the payment of royalty on all coal mined by the lessee and the Central Coal and Coke Company was never permitted to use these credits, upon the theory that the purchaser was entitled to the royalty upon the coal mined after the sale (R. 65).

Thereafter the purchaser, Carbon Coal Company, having failed to make payment required by the terms of the purchase, the sale was cancelled as to the coal deposit tracts under each of the said leases on October 24, 1929 (R. 64, 69), and the royalties paid by the Central Coal and Coke Company were forfeited and credited to the Choctaw and Chickasaw Nations (R. 69). This resulted in the Choctaw and Chickasaw Nations being doubly paid, for coal mined, to the extent of $773.52 on Lease No. 1, and $773.28 upon Lease No. 2 (R. 68). It was the practice of the Department of the Interior and the Agency at

Muskogee to deny the claims for credit under such circumstances (R. 66, 67).

It is manifest that under the terms of the leases and Section 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433), the Choctaw and Chickasaw Nations were indebted, at the time of the hearing on the claim of the said Tribes in the Western District of Missouri, in said sums.

Statutory Credits by Reason of the Purchase of the Segregated Coal Deposit.

The Central Coal and Coke Company was the lessee of the leases designated No. 3, executed April 26, 1902 (R. 35), and No. 4, executed the same date (R. 36). The coal deposits under these leases were advertised and sold under the Act of February 8, 1918, c. 12 (40 Stat. 433) (R. 71) (Appendix Item 4). At that sale the lessee, Central Coal and Coke Company, was the purchaser on December 11, 1918 (R. 71).

Both the leases were undeveloped leases (R. 75). Under the provisions of Section 4 of the said Act, any lessee who became purchaser of any coal deposit under undeveloped leases owned by him, one-half of the advance royalty paid by the lessee on such lease should be credited to the purchase price thereof, and any residue of advance royalties paid by such lessee should be credited to such lessee on account of any production of coal on any other lease which he might own and operate.

There was to the credit of each of these undeveloped leases advance royalty paid to the amount of $8,600.00 (R. 72), one-half of which the Central Coal and Coke Company was entitled to use to pay on coal mined on Leases No. 1 and No. 2, or a total of $8,600.00 (R. 72).

Coal was thereafter mined on Lease No. 1 and upon Lease No. 2 in excess of the tonnage requirement under the terms of the Curtis Act, and of the leases, and the royalty on such excess coal should have been charged against

these credits (R. 72, 73, 74). This coal subsequently mined and paid for in excess of the advance royalty requirement for each year was also in excess of the amount of the credit of $8,600.00 from Leases No. 3 and No. 4 (R. 72, 74). If the coal deposit on the tracts of land embraced in Leases No. 1 and No. 2 had not been thereafter sold on June 17, 1920 (R. 64), the Central Coal and Coke Company would have been permitted to pay for said coal mined on Leases No. 1 and No. 2 out of the advance royalty credit of the Central Coal and Coke Company on undeveloped Leases No. 3 and No. 4 (R. 64).

Upon the cancellation of the sale to the Carbon Coal and Coke Company the Choctaw and Chickasaw Tribes received all the royalty the Central Coal and Coke Company had paid upon Leases No. 1 and No. 2, and which it had paid by reason of the denial of the credits set over by operation of Section 4 of the Act of February 8, 1918, c. 12 (40 Stat. 433), from Leases No. 3 and No. 4 (R. 74).

It is apparent that the Tribes received double payment of coal royalties to the extent of $8,600.00 upon Leases No. 1 and No. 2, and the Choctaw and Chickasaw Nations, at the time of the hearing in the Western District of Missouri, were indebted to the Central Coal and Coke Company in that sum.

Minimum Tonnage and Deficit Royalty Credit.

There was another claim arising from Lease No. 3. The Act of June 28, 1898, c. 517 (30 Stat. 495, 510), made provision for the payment of royalty for failure to mine coal in a certain quantity.

On December 6, 1907, the Secretary of the Interior promulgated rules increasing the requirement as to royalty to be paid for failure to mine. These regulations called for the production of fifteen thousand tons and the payment of royalty thereupon the fifth year of the lease, and each

succeeding year during the term thereof, or to pay royalty thereupon as if the amount had been produced. (Appendix Item 2.) This materially increased the amount to be paid for failure to mine as fixed by the Sections of the Curtis Act heretofore referred to. For administrative purposes this was known as minimum or deficit tonnage requirement (R. 70).

The Central Coal and Coke Company was notified that if it failed to pay this additional sum under the regulation the leases it owned would be cancelled (R. 70).

Under the regulations this deficit royalty to the credit of any lease could be used to pay royalty on any other coal mined by the same lessee upon leases owned and operated by such lessee (R. 70-76). There was to the credit of Lease 3 at the time of the hearing of the claim of the Tribes in the Western District of Missouri deficit minimum tonnage royalty paid by the Central Coal and Coke Company in the amount of $914.60, which had been collected under such regulation (R.70).

The power of the Secretary of the Interior to require such production was long a matter of contention. The United States court for the Eastern District of Oklahoma in the year 1910 in an action filed by the *United States for the use of the Choctaw and Chickasaw Nations* v. *McMurray*, 181 Fed. 723, held such regulation void. The Department acquiesced in this decision for a number of years and the controversy was finally settled September 7, 1933, by the decision of the Tenth Circuit Court of Appeals in the case of *United States* v. *M. K & T. Railway Company*, 66 Fed. (2d) 919, *United States* v. *Eastern Coal Company*, 66 Fed. (2d) 923, the court holding that such regulation was in violation of the Atoka Agreement and the Curtis Act.

The Choctaw and Chickasaw tribes were then indebted for this illegal exaction to the Central Coal and

Coke Company at the time of the hearing of the claim of the said Tribes, in the Missouri Court, in the sum of $914.60.

The total of this indebtedness amounts to $11,060.90 (R. 39, 105).

The sole ground alleged in the reply to the amended answer of the surety and the answer of the petitioner to the intervening petition was that the judgment was void for the reason that the evidence in the District Court of the Western District of Missouri showed that the Central Coal and Coke Company had failed to present its claim to the General Accounting Office of the United States for its examination, as required by the Act of March 3, 1797, c. 20, Sec. 3, 1 Stat. 514, 28 USCA §774 (R. 20, 27, 29).

The record and the evidence upon the claim in the District Court of Missouri was, by stipulation, introduced in the District Court of the Eastern District of Oklahoma (29-40; 39), as the evidence in this case, and no additional material evidence was offered (R. 49, 89).

The petitioner's attorney stated that the judgment of the Western District of Missouri was void as to the counterclaim of the Central Coal and Coke Company in that it had not been presented to the General Accounting Office for examination; that the evidence in that court was to be received as the evidence in this case because it would be the same if reintroduced; that such evidence established the failure to present the claim of the Central Coal and Coke Company to the General Accounting Office before the trial of the claim in the Missouri court; that the allowing of the claim of the United States for the Tribes was valid but that the allowing of any part of the counterclaim was void; that "if the court holds that that judgment as entered (judgment of the Western District of Missouri) is a valid judgment that is the end of the law suit, because they plead that judgment." (Appendix, Item 1.)

SUMMARY of ARGUMENT.

The government concedes that the federal court in Missouri had jurisdiction to entertain and allow the claim of the Tribes and the claim of the Central Coal and Coke Company against the Tribes for the purpose of extinguishing the tribal claim; but contends that the court in Missouri had no jurisdiction to render an affirmative judgment that was conclusive in the federal court of Oklahoma (Petitioner's brief 9).

I.

A. The government contends that no judgment may be entered against the United States. We assert that the case does not involve that question, as the claim of the respondent, Central Coal and Coke Company, is not against the United States but against the Choctaw and Chickasaw Tribes. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; *Folk* v. *United States*, 233 Fed. 177.

B. The federal court in Missouri had jurisdiction to render an affirmative binding judgment against the Tribes. We shall outline and summarize the points presented by the statement under numbers 1 to 5, inclusive.

1. Jurisdiction to enter an affirmative judgment in the federal court in Missouri was conferred by Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with the applicable statutes conferring jurisdiction in that court. The whole of the act was broad and comprehensive, and provided for the final disposition of tribal affairs. Of the affairs requiring disposition was the claim of the Tribes for money or claims against the Tribes for money. The Act, being remedial, should be liberally considered. *Beley* v. *Naphtaly*, 169 U. S. 353, 359-60.

At the time of its enactment it was well settled that the United States might institute suits for the collection of

tribal money even though it had no pecuniary interest in the recovery sought. *Heckman* v. *United States*, 224 U. S. 413; *LaMotte* v. *United States*, 254 U. S. 270. Ordinarily the Attorney General was the proper officer to institute such proceedings. *United States* v. *Throckmorton*, 98 U. S. 61. The law being established and presumptively within the knowledge of Congress it provided in Section 18 of the Act that the Secretary of the Interior, either before or after the dissolution of the tribal government, was authorized to bring suit in the name of the United States for the tribes for the collection of moneys, and is within the provision of Section 24 (1) of the Judicial Code, 28 U. S. C. §41 (1), vesting District Courts of the United States with original jurisdiction of all suits of a civil nature brought by the United States or by any officer thereof authorized to sue. And this jurisdiction was not restricted by the remainder of the paragraph giving the territorial courts of Indian Territory a like jurisdiction. *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463. The petitioner so concedes.

The remaining portion of the section authorized party defendants in these actions to set up any claim against the Tribes, the ascertainment of any balance in the United States Courts of Indian Territory, and the payment of such balance upon presentation of the decree to the Treasurer of the United States.

The section has a two-fold purpose, *first*, the granting of the substantive right to sue for moneys due the Tribes with the corresponding right of the party defendants to assert claims against the Tribes and, *second*, as a procedural corollary, vesting in the territorial courts jurisdiction of the Tribal claim and the party defendants' claim. It was fairly within the purpose that the immunity of the Tribes from suit was waived and the Tribes was subjected to defendant's claim. A thing within the intention of the

makers of a statute is as much within the statute as it were within the letter. *Barett* v. *Van Pelt*, 268 U. S. 85, 90.

The tribal right of action for money was a transitory action and enforcible in the District Courts of the United States whether given by common law or statute. *Texas Pacfic R. R. Co.* v. *Cox*, 145 U. S. 593; *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448. The claim of the party defendant was likewise transitory and a part of the statutory right of action, which could be asserted in any jurisdiction where the Tribal claim was sought to be enforced. *Fidelity Insurance, Trust and Safe Deposit Co.* v. *Mechanics' Bank*, 97 Fed. (3 C. C. A.) 297-303; *Vermont Bank* v. *Porter*, 5 Day 157. Any other conclusion would be unreasonable, unjust and absurd. *Heydonfelt* v. *Dayney, etc., Mining Co.*, 93 U. S. 634; *Fleischman C. Co.* v. *United States*, 270 U. S. 349, 360.

The federal court in Missouri, in the reorganization proceeding of the respondent Central Coal and Coke Company under Section 77-B of the Bankruptcy Act, had exclusive jurisdiction of the debtor's property, with all the powers of an equity receiver, including the power to compel debtors to litigate their claims. *Continental Illinois Bank and Trust Co.* v. *Chicago, Rock Island and Pacific R. R. Co.*, 294 U. S. 648; *White* v. *Ewing*, 159 U. S. 36, 38. The claims of the parties having arisen from the same transaction the federal court in Missouri had jurisdiction to allow the claim of the respondent Central Coal and Coke Company. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609; Equity Rule 30. It follows that Section 18 of the Act, when considered with Section 24 (1) of the Judicial Code, Equity Rule 30, and 77-B of the Bankruptcy Act, vested jurisdiction in the federal court of Missouri to determine a balance due the Central Coal and Coke Company.

2. Congress has consented to an affirmative judgment against the Tribes and the right to have a party defendant's claim asserted in the federal courts of Oklahoma was waived by the United States and the Tribes by contesting the claim without objection in the federal court in Missouri. No objection was made to the trial of the claims of the parties in the federal court in Missouri and there was no appeal from the judgment in favor of the counterclaimant, and the judgment is conclusive. *Peoria and Pekin R. R. Co.* v. *United States*, 263 U. S. 528, 535; *Richardson, Treasurer of Porto Rico* v. *Fajardo Sugar Company*, 241 U. S. 44.

3. The determination of the federal court in Missouri of the question of jurisdiction, though not presented to that court, may not be collaterally assailed. *Chicot County Drainage District* v. *Baxter State Bank*, No. 102, decided by the Supreme Court January 2, 1940.

4. The Choctaw and Chickasaw Nations are not sovereigns so as to entitle them to the plea of immunity. Neither of the two grounds upon which sovereign immunity from judgment is based, as regards domestic sovereigns, because the state must enforce it, *Kawananakoa* v. *Polyblank*, 205 U. S. 349, as regards foreign sovereigns, because it would be an unfriendly act derogatory to the sovereign right, *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410, here exists. The concept of sovereignty must embrace at least subordinate governmental functions. The Tribes are not such. This is so by reason of various Congressional enactments and Tribal treaties and the Act of April 26, 1906, providing for a final disposition of Tribal affairs. That the Tribes are not sovereign is recognized by petitioner. (Petitioner's brief 20, 21.)

The litigation here presented involves a trust fund held by the United States for the members of the Tribes, who

are citizens of the United States, having no tribal government but collectively owning certain funds and to which the United States has no claim. The court may direct the payment of those funds. *Orinoco Co. Ltd.* v. *Orinoco Iron Co.*, 296 Fed. 965, 972.

5. If the Choctaw and Chickasaw Tribes are entitled to the plea of sovereign immunity as a defense they are not an arm of the United States, *United States* v. *Algoma Lumber Co., supra,* but domestic dependent nations. *Cherokee Nation* v. *Georgia,* 5 Peters 1, 16. Sovereign immunity is a privilege which may be waived. *Clark* v. *Barnard,* 108 U. S. 436, 447, and a general appearance contesting the claim of an adversary without claiming immunity waives the plea. *The Sao Vicente,* 295 Fed. 829, 831. There was in the Tribes, while they existed as self-governing entities, a striking similarity between their government and that of the possessions of the United States and this court has applied the doctrine of waiver of immunity to governments of such possessions. *Richardson, Treasurer of Porto Rico,* v. *Fajardo Sugar Co., supra.*

C. The United States Court in Missouri had jurisdiction of the controversy before it and its judgment was binding in the Oklahoma suit. In the case relied upon by the Government, *United States* v. *Eckford,* 6 Wall. 484, it was held that the Circuit Courts of the United States have no jurisdiction of counterclaims against the United States, beyond extinguishment of the debt due the United States from the defendant. The Tribes are not the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. The United States, suing in behalf of the Tribes, had no greater rights than the Tribes. *Folk* v. *United States,* 233 Fed. 177.

Between ordinary litigants the controversy before the United States court in Missouri was one to which its

jurisdiction would extend. Judicial Code 24 (1), 28 U. S. C. §41 (1). And to which the procedure involved was applicable. Equity Rule 30. The character of the claimants did not deprive the court of jurisdiction for any one of the reasons set out under sub-division B, *supra*.

As the court had jurisdiction its judgment was binding in subsequent judicial proceedings. This is apparently conceded by the government. Subsection C, §1, Government's brief. Government's brief, *United States* v. *Shaw*, No. 570, this term, page 16.

Judgments against sovereigns though not judicially enforcible are final. *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92. And the judgment rendered in Missouri is peculiarly within the rule announced in *The Thekla*, 266 U. S. 328, because it involves an accounting as to a portion of a non-public fund paid into that fund by the defendant itself.

The judgment merged the preexisting claim. *Wycoff* v. *Epworth Hotel Const. Co.*, 146 Mo. App. 554. The judgment constituted a claim, the adjudication of which required only an examination of the regularity of its entry. It was therefore binding. COUNTER PROPOSITION: The error, if any, was failure of the trial court to re-examine the merits of the claim of the Central Coal and Coke Company upon the uncontradicted evidence before it, and as the Court was invited and induced not to consider such evidence by the petitioner, it cannot complain.

The evidence in the federal court in Missouri was introduced as the evidence in this case. In the petition for rehearing in the Circuit Court of Appeals the petitioners urged that the trial court should have re-examined this evidence for a determination of the counterclaim on its merits and that is the effect of petitioner's brief herein. At the trial petitioner's attorney stated that if the trial court should hold the judgment valid then it was the end of the

lawsuit, without limitation or qualification, and that the evidence should be considered solely to ascertain whether claim of the Central Coal and Coke Company had been submitted to the General Accounting office for examination, and thereby invited and procured a ruling that prevented the examination of the identical evidence offered in the federal court in Missouri on the merits. By reason of this action the petitioner cannot now complain. *The New York Elevated Railroad Company* v. *The Fifth National Bank of the City of New York*, 135 U. S. 432, 441, 442.

II.

The interveners came into this action as party defendants without objection and their claim was properly allowed under the Act of April 26, 1906. The judgment or finding of the Missouri court is conclusive. In this suit, originally commenced against the surety, the principals intervened as party defendants, *Rocca* v. *Thompson*, 223 U. S. 317, Black's Law Dictionary, 2nd Edition, pp. 651-652, even though they asked an affirmative judgment against the plaintiff. *Stratford Arms Hotel* v. *General Casualty Company*, 249 Mich. 518, 229 N. W. 506. The matter pleaded by the intervening defendants arose out of the same transaction. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. The claim of the intervening defendants does not arise from matters extraneous of the Tribes' claim. No objection was made to the new defendants intervening. This effected a joinder of new party defendants as though they had been originally sued. *French* v. *Gapen*, 105 U. S. 509, 525. The Secretary of the Interior thus chose the intervening defendants as party defendants. As a matter of procedure the court's action was proper. The federal law permits intervention without objection. *French* v. *Gapen*, 105 U. S. 509, 525. Intervention would be proper under Equity Rule 37. Opinion of the court below, Record page 129. Under the Conformity Act such intervention without objection would be permitted, as it is permitted in Oklahoma. *Garner* v. *Riddle*, 140 Okl. 70. The intervening defendants were defendants within the meaning of Section 18 of the Act of April 26, 1906.

ARGUMENT.

The brief on behalf of the government proceeds on two points, the first of which is divided into sub-heads A, B, and C.

In answer to the government's Proposition I we state:

I. The judgment of the United States Court in Missouri was binding in the Oklahoma suit.

A. ***There was no judgment against the United States.***

B. ***The United States Court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes.***

1. ***Such jurisdiction was conferred by Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with the applicable statutes conferring jurisdiction on District Courts of the United States.***

2. ***Congress has consented to an affirmative judgment against the Tribes and any right to have such claim asserted in the Federal Court of Oklahoma was waived by the United States and the Tribes by contesting such claim in the Federal Court in Missouri.***

3. ***The determination of the question of jurisdiction by the Federal Court in Missouri may not be assailed collaterally.***

4. ***The Tribes as now constituted are not sovereigns immune from suit.***

5. ***The defense of sovereign immunity was waived.***

C. ***As the United States Court in Missouri had jurisdiction its judgment was binding in the Oklahoma suit.***

Counter proposition: The error, if any, was failure of the trial court to re-examine the merits of the claim of the respondent, Central Coal and Coke Company, upon the uncontradicted evidence before it, and as the court was invited and induced not to consider such evidence, by the petitioner, it cannot now complain.

In answer to the government's Proposition II we state:

II. The interveners came into this case as party defendants, without objection, and their claim was properly allowed under the Act of April 26, 1906.

I.

A. There was no judgment against the United States.

We need not consider the jurisdiction of the United States court in Missouri to render an affirmative judgment against the United States. The counterclaim here asserted is not against the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. The United States brings this action on behalf of the Tribes and the rights involved and the consideration to govern the court's actions are those applicable to the Tribes. *Folk* v. *United States*, 233 Fed. 177; *United States* v. *Ft. Smith and Western Railway Co.*, 195 Fed. 211.

B. The United States Court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes.

1. ***Such jurisdiction was conferred by Sec. 18 of the Act of April 26, 1906, c. 1876 (34 Stat. 137, 144), when considered with the applicable statutes conferring jurisdiction in the District Courts of the United States.***

To understand the purpose of Section 18 the whole of the Act must be considered.[1] It is entitled: "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes."[2] It provides for the enrollment of minors

[1]The meaning of an act is to be determined not only by consideration of the words themselves but by considering the whole of the Act and the purposes of the law. Puerto Rico v. Shell Co., 302 U. S. 253, 258; Kohsaat v. Murphy, 6 Otto 153, 160.

[2]It is proper to consider the title of the Act in determining the legislative intent. Knowlton v. Moore, 178 U. S. 41, 65.

and the closing of the rolls of the Tribes, thereby definitely fixing the individuals entitled to the tribal benefits, for the settlement of the controversies with the Mississippi Choctaws, for the transfer of the tribal schools to the Secretary of the Interior, for his supervision until the establishment of a public school system, for the collection and disbursement of tribal revenues by the Secretary of the Interior, for the abolition of tribal taxes, for the surrender and accounting by tribal officers of tribal funds and property to the Secretary of the Interior, and for the transfer of all public buildings to the Secretary of the Interior, with direction to sell and credit the Tribes with the proceeds. All tribal funds were to be disbursed per capita and public lands held in trust by the United States for the individual members of the Tribes and their heirs. The provisions of the Act are comprehensive and in keeping with the purposes of the final disposition of the tribal affairs.

Of the affairs requiring disposition were claims of the Tribes for any money or the recovery of any land, and claims against the Tribes. Section 11, 31 Stat. 141, authorized the Secretary of the Interior to decide all claims against the Tribes; Section 18, 34 Stat. 144, authorized the Secretary of the Interior to bring suit in the name of the United States in behalf of any of the Five Civilized Tribes for the collection of any moneys or recovery of any land, and in any suit brought by or in behalf of any of the Five Civilized Tribes to recover money the party defendant was to have the right to have set up and adjudicated such party's claim against the Tribe.

The Act, under the sections with reference to these claims, being remedial should be liberally construed and in keeping with the comprehensive purposes of the Act. *Beley* v. *Naphtaly*, 169 U. S. 353, 359, 360; *Bechtel* v. *United States*, 101 U. S. 597, 600; *United States* v. *Pan-American Pet. Co.*, 6 Fed. (2d) 43, 83.

At the time of the passage of the Act and at the time of the filing of the claim of the Tribes in the United States District Court for the Western Division of the Western District of Missouri, it was well established that the United States, as guardian of the Indian Tribes, might institute suits or proceedings for the enforcement of Tribal rights. *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Noble*, 237 U. S. 74; *United States* v. *Osage County*, 251 U. S. 128; *LaMotte* v. *United States*, 254 U. S. 270; *Cramer* v. *United States*, 261 U. S. 219; *United States* v. *Minnesota*, 270 U. S. 181; *Mars* v. *McDougal*, 40 Fed. (2d) 247; *Tiger* v. *Twin State Oil Co.*, 48 Fed. (2d) 509. As such guardian it was a party in interest, even though it might have had no pecuniary interest in the recovery sought. *Heckman* v. *United States, supra; La Motte* v. *United States, supra; Cramer* v. *United States, supra; Tiger* v. *Twin State Oil Co., supra; United States* v. *New Orleans & Pac. Railway*, 248 U. S. 507. In such actions the Attorney General of the United States was the proper officer to institute, or cause to be instituted, appropriate proceedings for the protection of the tribal rights. *United States* v. *Throckmorton*, 98 U. S. 61; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Cause* v. *United States*, 240 U. S. 399; *Mars* v. *McDougal, supra, Pueblo Picuris in the State of New Mexico* v. *Abeyta*, 50 Fed. (2) 12.

The law being well established, and presumptively within the knowledge of Congress,[1] Section 18 of the Act of April 26, 1906, was enacted which provides among other things:

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[1]The general statutes conferring jurisdiction on the District Courts of the United States in an action brought by the United States, or by its officers authorized to sue, were presumably within the knowledge of Congress as all statutes with reference to jurisdiction should be considered in order to determine the legislative intent. Chappell v. United States, 81 Fed. 764, Converse v. U. S. 21 How. 463, 467; Marchie Tiger v. Western Inv. Co., 221 U. S. 286, 306.

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, * * *." (34 Stat. 137, 144.)

The language quoted authorized the Secretary of the Interior, as an officer of the United States, to institute suits or proceedings in behalf of the Choctaw and Chickasaw tribes in the name of the United States, and falls within the provisions of Sec. 24 (1) Judicial Code 28, U. S. C. §41 (1) (U. S. Comp. Stat. 1901, Sec. 563 (20), giving to the District Courts of the United States original jurisdiction of all suits of a civil nature, at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue.

At the trial of the claim of the government in the United States District Court for the Western Division of the Western District of Missouri, it was stipulated that the said claim was filed and being heard pursuant to authority of the Secretary of the Interior and approved by the Attorney General (R. 76, 77). The claim was in behalf of the Tribes upon the concurrent action of two officers of the United States, the Secretary of the Interior and the Attorney General.

It will be noted that the language quoted contemplates bringing of actions by the Secretary of the Interior for the collection of moneys claimed by the tribes, which action is transitory. A transitory action instituted in the name of the United States must be brought in the district

in which the defendant resides.[4] As the Central Coal and Coke Company was a resident of the Western division of the United States District Court for the Western District of Missouri, the claim was properly filed therein. And this original jurisdiction of the District Courts of the United States was not in any degree restricted by the language of Section 18 immediately following the portion we have heretofore quoted, which reads: "And the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits." The granting of jurisdiction to any court does not imply that such jurisdiction is to be exclusive. *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463.

Petitioner concedes that the authority given to the Secretary of the Interior, as a United States officer, when considered with Sec. 24 (1) Judicial Code, 28 U. S. C. §41 (1), vesting original jurisdiction in United States courts of all suits, of a civil nature, brought by the United States or by any officer thereof authorized by law to sue, fixed in the United States District Court for the Western District of Missouri jurisdiction to hear and determine the Tribal claim. (Petitioner's brief p. 9.) *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463; the opinion below, *United States* v. *United States Fidelity & Guaranty*, 106 Fed. (2d) 804, 809.

Petitioner further concedes that such court had jurisdiction of the claim of the Central Coal and Coke Company against the Tribes (Petitioner's brief, p. 9), *United States* v. *McDaniel*, 7 Peters 1; *Bull* v. *United States*, 295 U. S. 247, but only to the extent of extinguishing tribal

[4]Transitory actions brought by the United States with but few exceptions should be brought in districts where the defendant resides. Robertson v. Railway Labor Board, 268 U. S. 619, 622, 623; Stone v. United States, 167 U. S. 178, 182.

claim and that any affirmative finding against the Tribes is without force in other courts.

This limitation is based upon that portion of Section 18, reading:

> "Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

The section had a two-fold purpose, one of which was to authorize the Secretary of the Interior to institute suits in the name of the United States for the Tribes, with the corresponding right of the party defendant to set up and have adjudicated any claim which the defendant might have against the Tribes and for payment to the defendant of any balance that might be found due. Congress, having authorized the Secretary of the Interior to institute proceedings in the name of the United States for moneys of the Tribes in the United States District Court, it was fairly within its purpose and intent that the immunity of the Tribes from claims of the defendant was waived, and the Tribes were expressly subjected to such claim.

A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter. *Barret* v. *Van Pelt*, 268 U. S. 85, 90; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Fleischman C. Co.* v. *U. S.*, 270 U. S. 349, 360.

The other purpose was to vest in the United States

courts of the Indian Territory jurisdiction, but not exclusive jurisdiction, to try such actions and the defendant's claim as a procedural corollary to the substative rights conferred. The right of the United States to maintain such action in District Courts of the United States was certain. The jurisdiction of the Territorial courts to adjudicate demands by the Tribes for moneys was not free from doubt and it is not unreasonable to assume that Congress thought best to remove all doubt by expressly conferring jurisdiction. *United States* v. *Rea-Reed Mill & Elevator Co.*, 171 Fed. 501, 511.

In performing their function the Territorial courts were not exercising any of the judicial powers of the United States conferred by the Third Article of the Constitution, and from which the jurisdiction of the District Courts flow, but they were legislative courts exercising jurisdiction conferred by Section Three of Article Four of the Constitution, which empowered Congress to make regulations for the respective territories of the United States. *Wallace* v. *Adams*, 143 Fed. 716; *First National Bank of Brunswick* v. *County of Yankton*, 101 U. S. 129, 133. This jurisdiction was not exclusive. *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463.

The first purpose was to give the substantive rights or in any event to recognize preexisting rights. *United States* v. *Mann*, 26 Fed. Cases, page 1159, case No. 15716. This Tribal right was transitory and enforcible in the federal courts having jurisdiction of the subject-matter and the parties, whether given by common law or by statute. *Texas Pacific R. R. Co.* v. *Cox*, 145 U. S. 593; *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190, 197; *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 448.

Likewise the claim of "party defendants" is transitory, and the right to have such claim adjudicated and paid

is inseparable from that of the Tribes against "party defendants." Where the Tribal action of claim is asserted in a court having jurisdiction, the claim of "party defendants" may be adjudicated and ordered paid. *Fidelity Insurance, Trust and Safe Deposit Co.* v. *Mechanics' Bank*, 97 Fed. (3 C.C.A.) 297, 303; *Vermont Bank* v. *Porter*, 5 Day 157; *Benton* v. *Safe Deposit Bank*, 255 N. Y. 260. To hold otherwise would lead to an unreasonable and absurd result which was not within the intent of the makers of the law. *Fleischman C. Co.* v. *United States*, 270 U. S. 349, 360; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459; *Heydenfelt* v. *Dayney, etc., Mining Co.*, 93 U. S. 634; *Pickett* v. *United States*, 216 U. S. 456, 460.

The court of the Western District of Missouri in the reorganization proceeding of the Central Coal and Coke Company under Section 77-B of the Bankruptcy Act had exclusive jurisdiction of the debtor and its property wherever located and had all the powers which a federal court would have had if it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. *Continental Ill. Bank & Trust Co.* v. *Chicago, Rock Island and Pacific R. R. Co.*, 294 U. S. 648; *In re: Greyling Realty Corp.*, 74 Fed. (2d) 734. In such an equity receivership the court has the power to compel debtors of the corporation in receivership to litigate the debts by ancillary proceedings in the receivership. *White* v. *Ewing*, 159 U. S. 36, 38; and the claim of the Central Coal and Coke Company against the Tribes having arisen from the same transaction the court of the Western District of Missouri had jurisdiction to allow the claim of the Central Coal and Coke Company. Equity Rule 30; *United States* v. *National City Bank of New York*, 83 Fed. (2d) 236; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. "The agrument (for allowing

the suit) is the stronger if the creditor from any cause (its sovereign immunity) cannot be coerced to pay this demand." *United States* v. *Mann*, 26 Fed. Cases, page 1156, Case No. 15716.

The proceeding in the Western District of Missouri, being one in equity, the claim of the United States, or of the Tribes, is no greater than those of a private citizen, and they were judicible in that court by every rule of equity applicable to the rights of a private citizen under like circumstances, and the rights of the United States therein was no greater than that of the Tribe. *Folk* v. *United States*, 233 Fed. 177.

It follows that Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, when considered with 28 U. S. C. §41 (1), 77-b of the Bankruptcy Act, and Equity Rule 30 vests jurisdiction in the United States District Court for the Western District of Missouri to affirmatively determine a balance due the Central Coal and Coke Company.

2. Congress has consented to an affirmative judgment against the Tribes, and any right to have such claim asserted in the federal courts of Oklahoma was waived by the United States and the Tribes by contesting such claim in the federal court in Missouri.

The trial of the tribal claim and of the claim of the Central Coal and Coke Company, in the Western District of Missouri, shows that the question of immunity of the Tribes from suit in any federal court other than the federal courts of Oklahoma was not presented (R. 29-89). The only pleading filed to the claim of the Central Coal and Coke Company was a reply by the United States and the Tribes, consisting of a general denial of the claim (R. 61). There was no appeal from the finding of that court.

The government concedes that Sec. 18 of the Act of

April 26, 1906, c. 1876 (34 Stat. 137, 144), has expressly subjected the Five Tribes to affirmative judgments on claims interposed by the "party defendants"; but only in suits brought by the Government on behalf of the Tribes in the federal courts of Oklahoma (Petitioner's brief, p. 21), and that consent to be sued in one district does not authorize suits elsewhere, citing *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

That case considers the Act of October 22, 1913, c. 32 (38 Stat. 219), providing, "that a suit 'to enforce, suspend or set aside, in whole or in part' " an order of the Commission relating to transportation, and made upon petition, may be brought only in the district " 'wherein is the residence of the party or any of the parties upon whose petition the order was made.' " (245 U. S. 502). It was held that the cross-bill which sought to set aside the order of the Interstate Commerce Commission over objection of the opposing parties could not be filed in a district other than in which the order was made upon petition and not being so filed should be dismissed. The holding therein was qualified by the case of *Peoria & Pekin Union R. R. Co.* v. *United States*, 263 U. S. 528, 535, wherein it was held that the provision requiring suit to be brought in a particular district was for the benefit of the residents of the district, and that the challenge was to the jurisdiction of the particular district, and the privilege not to be sued elsewhere could be waived, and was waived by the United States.

The proceeding in the Western District of Missouri was more nearly similar to the facts in the case of *Richardson, Treasurer of Porto Rico* v. *Fajardo Sugar Company*, 241 U. S. 44, 47, wherein suit was brought in the Federal District Court and it was urged that as Porto Rico, a government having sovereign attributes, had only consented to be sued in its own courts the suit could not

be maintained in the Federal District Court. It was held that having solemnly appeared and having failed for a period of eight months to raise the question of immunity the jurisdiction of the federal court could not thereafter be denied.

By the failure of the United States to object to the assertion of the claim of the Central Coal and Coke Company in the proceeding in the Western District of Missouri, and its further failure to appeal from the decision therein rendered, the right to have the suit tried only in the federal courts of Oklahoma was waived.

3. ***The determination of the question of jurisdiction by the federal court in Missouri may not be assailed collaterally.***

We have shown that the court of the Western District of Missouri had jurisdiction to enter an affirmative finding against the Tribes. In any event the court had before it the question of determining its jurisdiction, under Section 18 of the Act of April 26, 1906, and the other statutes heretofore called to the court's attention, vesting the Missouri court with jurisdiction of the claim, and having so determined that judgment is *res adjudicata* though the petitioner failed to raise the qestion. *Chicot County Drainage* v. *Baxter State Bank*, No. 102, decided January 2, 1940; *Stoll* v. *Gottlieb*, 305 U. S. 165.

The government attempts to distinguish the *Chicot County* case, *supra*, by limiting it to private litigants and assert to apply it to this case would defeat the principle that the Attorney General cannot by act submit the United States to suit. The claim of the respondent is not a claim against the United States. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. When the claim of the Tribes was submitted to the Missouri Court the United States and the Tribes were a litigant like any other suitor. *Richardson, Treasurer*, v. *Fajardo Sugar Co.*, 241 U. S. 44; *People of*

Porto Rico v. *Ramos*, 232 U. S. 627; *Folk* v. *United States*, 233 Fed. 177.

Further, it is suggested that as the judgment was valid in all respects except as to the balance found due the Central Coal and Coke Company from the Tribes that the Government and the Tribes could not reasonably anticipate the Missouri Court would exceed its jurisdiction. The Central Coal and Coke Company requested upon its claim affirmative relief in excess of the Tribal claim (R. 37), and the Government's attorneys either knew the question of jurisdiction as to affirmative finding against the tribes was for consideration or if any consideration was given to that question it was determined that the jurisdiction of the Western District of Missouri could not be successfully challenged. When the question appeared from the pleadings there was a definite way in which the question could have been presented and of which the petitioner did not avail itself. *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410; *The Gloria*, 296 Fed. 188.

4. *The Tribes as now constituted are not sovereigns immune from suit.*

As they now exist the Choctaw and Chickasaw Nations are not sovereigns so as to entitle them to the plea of immunity. This right has always been based on one of two grounds. As regards domestic sovereigns, upon the ground that no judgment should be rendered against the State because the State must enforce it. See: *Kawananakoa* v. *Polyblank*, 205 U. S. 349. As to foreign sovereigns, upon the ground that the use of judicial process would be an unfriendly act, derogatory of the sovereign right. *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410; *Dexter and Carpenter* v. *Kunglig Jarmvagsstyrelsen*, 43 Fed. (2d) 705. The concept of sovereignty is that of a government exercising at least subordinate gov-

ernmental functions. *Kawananakot* v. *Polyblank, supra.* The Choctaw and Chickasaw Nations are not such.

By a succession of treaties and acts of Congress their sovereignity, always of a subordinate character, has been done away with. By the Act of March 3, 1871, c. 120, 16 Stat. 566, Congress decreed that the Indian Tribes should no longer be recognized as independent sovereignties with whom the United States might contract by treaty. By the Act of June 7, 1897, c. 3, 30 Stat. 62, 83, the tribal laws were done away with, and the laws of the United States and the laws of the State of Arkansas were put in force in the Indian Territory, to be administered exclusively by the United States courts in the Territory. By the Choctaw-Chickasaw original agreement, known as the Atoka Agreement (Act of June 28, 1898, c. 517, Sec. 29, 30 Stat. 495, 505), their government was shorn of most of its remaining powers. Tribal courts were limited in jurisdiction, the acts of their legislative bodies were, in many matters, subject to the approval of the President of the United States before having validity, and the modified governments were to exist for only eight years from March 4, 1898. The tribal funds were to be capitalized within one year after the tribal governments should cease, that is by March 4, 1907, and were to be paid out per capita, and the members of the tribes were to become citizens of the United States upon the dissolution of the Tribes. The Act approving the Atoka Agreement abolished the Tribal courts altogether. Act June 28, 1898, c. 517, Sec. 28, 30 Stat. 495, 504. The members were subsequently made citizens of the United States by the Act of March 3, 1901, c. 868, 31 Stat. 1447. By the Choctaw-Chickasaw Supplemental Agreement, being Act of July 1, 1902, c. 1362, 32 Stat. 641, the proceeds of tribal property were directed to be put into the United States treasury, and the tribal funds in possession of the United States were directed to

be disbursed per capita under the supervision of the Secretary of the Interior. Both the original and supplemental Choctaw-Chickasaw Agreements contemplated the allotment of the tribal lands to individuals. The final winding up of the affairs of the tribes was provided for by the Act of April 26, 1906 (discussed *supra* under Section B-1 of this brief). The operation of this Act accomplished the final dissolution of the Tribal governments of the Choctaw and Chickasaw Nations as governments. That the Tribes are not now sovereigns is apparently recognized by petitioner (Brief 20, 21).

The individual ownership of the proceeds and the fact that the United States was acting as trustee for the individual members of the Tribes rather than for the Tribes, as subordinate governments, is more clearly shown with regard to the coal and asphalt lands than as to the general affairs of the Tribes. The original agreement provided that the coal and asphalt land should be and remain "common property" of the members of the Tribes, each having an equal undivided interest. The income was to be used for the education of the children of Indian blood of the members of the Tribes, and was to be withdrawn in accordance with rules promulgated by the Secretary of the Interior, and it was provided that whenever members of the Choctaw and Chickasaw Tribes should be required to pay taxes for the support of schools (long since required) then the fund raised from such royalties should be disbursed for the equal benefit of their members in such manner as the Tribes might direct. No provision was made by the original agreement for the sale of the coal lands. In the Supplemental Agreement provision was made for such sale, the proceeds to be deposited in the United States treasury to the credit of the Tribes and paid out per capita.

The litigation now before the court involves a trust fund held by the United States for the individual members

of the Choctaw and Chickasaw Tribes of Indians, who are citizens of the United States, having no tribal government but collectively owning certain properties and funds.

Where the United States government holds funds of its citizens, to which it lays no claim itself, the court may direct the payment of those funds. *Orinoco Co. Ltd.* v. *Orinoco Iron Co.*, 296 Fed. 965, 972, affirmed under the style of *Mellon* v. *Orinoco Iron Company*, 266 U. S. 121.

5. *The defense of sovereign immunity was waived.*

If the Choctaw and Chickasaw Nations as they now exist are sovereigns and entitled to raise in their defense the plea of immunity they are certainly not an arm of the United States. They are "domestic dependent nations". *Cherokee Nation* v. *Georgia*, 5 Peters 1, 16. See *Stevens* v. *Cherokee Nation*, 174 U. S. 445. The United States assumes no liability by reason of its character as protector of them. *United States* v. *Algoma Lumber Company*, 305 U. S. 415. Their position is somewhere between such integral parts of the United States as a state or territory and a foreign nation. From the rule with regard to domestic and foreign sovereigns appearing in the United States courts we may arrive at a proper rule concerning the Tribes.

Sovereign immunity is a personal privilege which may be waived by the sovereign. *Clark* v. *Barnard*, 108 U. S. 436, 447.

See *Kawananakoa* v. *Polyblank*, *supra*. There is nothing about the sovereignty of a party that deprives a court of jurisdiction. A general entry of appearance contesting the rights of an adverse party without claiming immunity waives the plea. *The Sao Vicente*, 295 Fed. 829, 831. The appearance of a sovereign in a court contesting the merits of a counterclaim raised by the defendants in a suit voluntarily brought by the sovereign waives the plea of sovereign immunity. *Dexter and Carpenter* v. *Kunglig*

Jarnvagsstyrelsen, 43 Fed. (2d) 705. A foreign nation may so waive immunity. *The Sao Vicente*, 295 Fed. 829; *The Sao Vicente*, 281 Fed. 111, certiorari dismissed, 260 U. S. 151. See *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 Fed. (2d) 705. A state may so waive immunity. *Clark* v. *Barnard*, 108 U. S. 436. A territory may so waive immunity. *People of Porto Rico* v. *Ramos*, 232 U. S. 627; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44. There was in the Tribes, while they existed as self-governing entities, a striking similarity between their government and that of the possessions of the United States. The case of *Richardson* v. *Fajardo Sugar Company, supra*, is a close parallel to the instant case.

Accordingly, the authorities relied upon by the Government are not applicable. In each of the cases the sovereign involved immediately and continuously raised the defense of immunity. In this case the Tribes not only did not plead immunity at the outset of the litigation before the United States court in Missouri, they never did plead it. It follows then that under the holdings of each of the cases the plea of immunity was waived, and the United States court in Missouri had the jurisdiction to proceed and render a complete judgment.

C. As the United States Court in Missouri had jurisdiction its judgment was binding in the Oklahoma suit.

The judgment of the United States Court in Missouri was that the Choctaw and Chickasaw Tribes took nothing and that the credit of the Central Coal and Coke Company be fixed as against the Choctaw and Chickasaw Tribes, "and to be secured and collected in the manner provided by law," recognizing that the court did not have authority to render a judgment judicably collectible against the Tribes.

The Government, in contending that the judgment

of the Missouri court has no affect upon the Oklahoma court, places all reliance upon the case of *United States* v. *Eckford*, 6 Wall. 484. The holding of that case was that the Circuit Courts of the United States had no jurisdiction of suits against the United States, either in original suits or on counterclaim, beyond extinguishment of the debt due from the defendant to the United States. No such difficulty is met in the instant case. The Tribes are not the United States. *United States* v. *Algoma Lbr. Co.*, 305 U. S. 415. The United States in suing on behalf of the Tribes has no greater right than the Tribes. *Folk* v. *United States*, 233 Fed. 177; *United States* v. *Ft. Smith & Western Ry. Co.*, 195 Fed. 211. A substantive right to affirmative judgment against the Tribes is accorded defendants.

The suit in Missouri was brought by officers of the United States authorized by law to sue, so the Missouri court had jurisdiction on this ground. Judicial Code 24 (1), 28 U. S. C. §41 (1). The matter before the District Court in Missouri was one to which its jurisdiction would extend between ordinary litigants, as the suit arose under the laws and treaties of the United States, Judicial Code 24 (1), 28 U. S. C. §41 (1): the claim under the Act of June 28, 1898, 30 Stat. 495; the counterclaim, as to illegal exaction of deficit royalty under the same Act, and as to the credits refused to be granted under Sec. 4 of the Act of February 8, 1918, c. 12, 40 Stat. 433, and the regulations promulgated by the Secretary of the Interior pursuant to such Act. (See findings of Special Master, R. 53.) The case before the United States court in Missouri was in equity, so whether the right to counterclaim be procedural or substantive (See *The Gloria*, 286 Fed. 188), the defendant could interpose it and obtain an affirmative judgment. (Equity Rule 30.)

Heretofore we have shown that the peculiar character of the claimants did not deprive that court of juris-

diction. The Missouri court had jurisdiction of the controversy for any one of the following reasons: jurisdiction was conferred by Section 18 of the Act of April 26, 1906, together with the applicable general statutes of jurisdiction; it was accorded by the act of the parties waiving the proper court; that court made a binding determination of its jurisdiction; it existed because no immune sovereign's rights were involved; the plea of sovereign immunity was waived. Accordingly the court's judgment is *res judicata* of the complete controversy.

Bottomed, as is the case of *United States* v. *Eckford*, *supra*, on the ground that the United States courts lacked jurisdiction of suits against the United States, it is no authority for the proposition that a valid judgment of a court with jurisdiction of the controversy, but lacking authority to enforce its judgments, is not *res adjudicata* in subsequent judicial proceedings. Many examples of such judgments held binding could be cited. The most usual is an order of surcharge of a probate court—*res judicata*, but requiring a suit to enforce it. *Boudinot* v. *Locust*, 55 Okl. 662. The government seems to concede that if the Missouri court had jurisdiction its judgment or finding would be binding in this later litigation. (Sub-section "C", Sec. I, Government's brief.) In the case of *United States* v. *Shaw*, No. 570, pending before this Court, the government attacking a probate court's finding, alleged to be unenforcible, says (*United States* v. *Shaw*, page 16):

> "But under the Michigan law, the order of the probate court is not subject to collateral attack. * * * And since the question of the probate court's jurisdiction to enter the order has been raised and litigated in this case, the order would presumably have to be given the effect of *res judicata* in an independent proceeding, which is precisely what this Court held could not be done in the *Eckford* case."

The trend of modern authorities is to differentiate between the authority to render a judgment and the authority to order its enforcement. *The Gloria*, 286 Fed. 188. In none of the cases heretofore cited, holding that the immunity of the sovereign had been waived, did the court concern itself with the consideration of whether or not its judgment was collectible. Such consideration does not control the action of the court in rendering judgment. *The Newbattle*, 10 Prob. Div. 33, 5 Aspinall Maritim Cases, N. S. 356 (1885); *United States* v. *Neustra Senoria De Regla*, 108 U. S. 92. In a series of prize and admiralty cases holding that the court had authority to render judgment, although the issue of sovereign immunity was squarely raised and not waived, this court in unmistakable terms considered its judgments as adjudications meant to set at rest any further judicial controversy, and not mere private expressions of opinion on the part of the Justices, despite the unenforcible character of such judgments. *United States* v. *Neustra Senoria De Regla, supra; The Paquete Habana*, 189 U. S. 453; *United States* v. *The Thekla*, 266 U. S. 328. This Court has indicated that the same rules apply to common law cases. *Guaranty Trust Company* v. *United States*, 304 U. S. 126. The lower federal courts in common-law cases have regarded their judgments or findings as adjudications and not mere statements of private conviction, although not judicially enforcible. *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrellsen*, 43 Fed. (2d) 705; *Russia* v. *Banker's Trust Co.*, 4 Fed. Sup. 417, affirmed *United States* v. *National City Bank of New York*, 83 Fed. (2d) 236, Cert. denied 299 U. S. 563; *The Gloria, supra.*

The instant case comes within the ruling of *The Thekla.* The court there likened libel and cross-libel in admiralty to a bill for an accounting importing an offer to pay a balance if the accounting should turn out against

the party bringing the bill, and in rendering the judgment concludes (p. 340-341):

> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest."

The claim of the Tribes did not of itself make such offer but that claim, together with the reply, was both an allegation of an amount due and a denial that any amount was due to the Central Coal and Coke Company. There was a *res* before the court, the standing of the account—the counterclaim seeking to subject a portion of certain funds held by the United States as trustee for the use and benefit of the individual members of the Choctaw and Chickasaw Tribes of Indians, a portion paid into that fund by the Central Coal and Coke Company. No fund used for governmental purposes will be taken when it is paid, no taxes will be required to pay it or to replenish a public treasury depleted by its payment.

When the judgment was rendered in Missouri the claim theretofore existing was merged in it. *Wycoff v. Epworth Hotel Const., etc., Co.*, 146 Mo. App. 554. Certainly this judgment qualified as a claim within the controlling statute allowing a defendant to set up and have adjudicated "any claim." A judgment rendered by the federal court having jurisdiction is binding and conclusive upon a federal court in another district. In this case, involving the same subject matter and between the same parties, to adjudicate such claim, evidenced by such judgment, required the court in Oklahoma only to examine the regularity of its entry. From every consideration the judgment of the United States Court in Missouri was binding in Oklahoma.

COUNTER PROPOSITION.

The error, if any, was failure of the trial court to re-examine the merits of the claim of the respondent, Central Coal and Coke Company, upon the uncontradicted evidence before it, and as the court was invited and induced not to consider such evidence, by the petitioner, it cannot now complain.

The additional statement establishes that the evidence before the federal court in Missouri was introduced as the evidence in this case. This evidence presented no conflict and was the basis of the decree of the Missouri court. This cause was filed before the judgment of the federal court in Missouri was entered (R. 9, 13, 59, 60). There was no appeal from that judgment, notwithstanding it was apparent that it must materially affect the present action. The record so showing there is a strong presumption that the Special Master's finding, upon which the judgment was based in the Missouri court, was correct.

The United States in its petition on rehearing in the Circuit Court of Appeals contended that the District Court should have re-examined this evidence for a determination of the counterclaim on its merits. (Appendix, Item 5.) The argument and brief of the petitioner is to the same effect.

At the trial of this case the attorney for the United States stated that the judgment of the District Court of Western Missouri was void as to the counterclaim of the Central Coal and Coke Company for the reason that it had not been presented to the General Accounting Office for examination; that the evidence in the court of the Western District of Missouri was to be received as the evidence in this case because it would be the same if reintroduced; that such evidence should be considered to establish a failure to present the claim of the Central Coal and Coke Company to the General Accounting Office before

the trial of the claim in the Missouri court; and that the allowing of the claim of the United States for the Tribes was valid but the allowing of any part of the counterclaim was void, and that "if the court holds that the judgment as entered (the judgment of the Western District of Missouri) is a valid judgment that is the end of the lawsuit, because they plead that judgment." (Appendix, Item 1.)

The language is to the effect that if the judgment be valid it was so without limitation or qualification and valid for all purposes. Had this not been for the position of the United States in the trial court it is reasonable to presume that the court would have examined the evidence. The error, if any, was the failure to examine the identical evidence that was before the Missouri court and to render a decision thereupon. The court was invited and induced not to make such an examination and at the time when the merits could have been considered.

By procuring the ruling under which the trial court proceeded the United States waived the right to object. *Law* v. *United States*, 266 U. S. 494, 496; *The New York Elevated Railroad Company* v. *The Fifth National Bank of the City of New York*, 135 U. S. 432, 441, 442; *Hansen* v. *Boyd*, 161 U. S. 397, 411; *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S. 41, 52; *Dante & Russell* v. *H. A. Halsbad Lumber Co.*, 103 Fed. (2d) 306.

II.

The interveners came into this case as party defendants, without objection, and their claim was properly allowed under the Act of April 26, 1906.

We have shown that the judgment or finding of the Missouri court is conclusive. We turn now to the propriety of the defense interposed by the Central Coal and Coke Company in the Oklahoma suit. The Government in its brief neglects to state that the intervention was without

objection. The object of the intervention was to defeat the claims of the Tribes by showing a balance due from the Tribes in regard to the very leases on which this suit was brought. This was a proper subject for a judgment under the Act.

The quibble appearing in the Government's brief as to the terminology employed, that is, the use of the term "intervener" instead of "defendant," cannot change the character of the intervention. The surety was sued. The principal intervened to defend on the ground that nothing was owed because it had claims against the obligee of the bond far in excess of the obligee's claim against it. Parties are arranged as to what they are not what they term themselves. Interveners may join as parties plaintiff, as parties defendant, or as parties claiming adversely to both the plaintiff and the defendant. *Rocca* v. *Thompson*, 223 U. S. 317; Black's Law Dictionary, 2nd edition, pp. 651-652.

Parties with a community of interest opposed to the plaintiff are defendants. A principal intervening in a suit against his surety occupies the position of defendant although the principal asks and recovers an affirmative judgment against the plaintiff. *Stratford Arms Hotel Co.* v. *General Casualty Co.*, 249 Mich. 518, 229 N. W. 506. A principal has the right to intervene in such an action. *Becker* v. *Northway*, 44 Minn. 61.

The matters pleaded by these intervening defendants arose out of the transaction that was the basis of the principal suit—the standing of the accounts of the principal on coal leases No. 1 and No. 2. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609. All items set out by the intervening defendants were proper credits to be applied on those leases but which had been refused while royalty in excess of the amounts of these credits had been exacted. Proof of the claims to defeat the action for roy-

alty alleged to be due entailed the proof necessary for affirmative relief. The fearful phantom which the Government envisages—the possibility of an intervener coming in and litigating extraneous claims outside the intent of Section 18 of the Act of April 26, 1906—does not exist in this case. The petition in intervention of the intervening defendants was attached to their request for leave to intervene. No objection anywhere appears. The Government's answer contains no objection to the intervention. Such objection is now too late. As the court below said (Record 129):

> "Furthermore, no objection was made to the filing of the petition in intervention, and therefore the interveners should be treated for all intents and purposes as though they had been made parties defendant and had set up their matters in defense by way of counterclaim. *French* v. *Gapen*, 105 U. S. 509. It certainly cannot be contended that the matters pleaded in the intervention would be vulnerable to objection on the ground of injecting foreign issues into the cause if the interveners had been joined as parties defendant and had pleaded them by answer and counterclaim."

The intervening defendants were certainly proper parties defendant that the Government could have joined. The effect of the Government's failure to object to their intervention as defendants is the same as though the Government had, by supplemental petition, joined them as parties defendant. If the Secretary of the Interior had the right to choose the parties whom he wished to sue he effectively chose the intervening defendants by his failure to object to their intervention.

As a merely procedural matter the action of the court below was correct. If the federal law governs the procedure, all aside from the right of the intervening defendants to come in pursuant to Equity Rule 37 (see: opinion

of the court below, R. 129), the federal cases permit the intervention of parties where such intervention is without objection by the plaintiff. *French* v. *Gapen*, 105 U. S. 509, 525; *Perry* v. *Godbe*, 82 Fed. 141; *Illinois Steel Co.* v. *Ramsey*, 176 Fed. 853. If the Equity Rules are not applicable to this action then, under the Conformity Act, the law of the State of Oklahoma would govern. *Cole* v. *Ralph*, 252 U. S. 286. See: Dobie On Federal Procedure, 601; Moore Federal Practice, Sec. 24. 03. Intervention is permitted in Oklahoma in law actions when made without objection. *Garner* v. *Riddle*, 140 Okl. 70.

Accordingly, the intervening defendants are party defendants within the meaning of the Act of April 26, 1906.

Conclusion.

For the reasons we have shown we respectfully submit that the judgment of the court below should be affirmed.

BOWER BROADDUS,
JULIAN B. FITE,
Attorneys for Respondents, United States Fidelity and Guaranty Company, a Corporation; J. M. Bernardin, Trustee of the Central Coal and Coke Company; and the Central Coal and Coke Corporation, a Corporation.

APPENDIX.

ITEM 1. For the reason that omitted portions of the record were, by stipulation, made a part of the transcript and cannot be given a record page at this time because not yet printed, we quote certain portions of the statement of the attorney of the petitioner upon the trial.

"It is our contention that the reason that the court had no jurisdiction and was without authority to render that judgment was because the record in that case—the record includes the proceedings and all evidence that was introduced both before the Special Master and the court—the record as I say does not show in any way, fails to show that a claim was presented by the Central Coal & Coke Company to the General Cocounting Office of the United States and by that department disallowed, and for that reason under a statute of the United States it is our contention that that court was without jurisdiction to render that judgment."

* * * * * * *

"The evidence which was introduced before the Special Master and the proceedings before him to sustain the Government's claim, as well as the counter-claim of the Central Coal & Coke Company, that evidence it has been agreed between the parties in this case would be submitted to this court and received by this court as the evidence in this case, because the evidence would be the same if we reintroduced it."

* * * * * * *

"We contend that that evidence and those proceedings and the record in that case is considered in this case for the purpose of showing that nowhere in that record, nowhere in that proceeding will it appear that the Central Coal & Coke Company ever presented its claim to the General Accounting Office and any action was taken."

* * * * * * *

"The Court: You claim their counterclaim was void?

Mr. Champion: We claim that the court had no authority or jurisdiction to render judgment against the government upon their counterclaim.

The Court: Did they have authority to consider the counterclaim to the extent it would defeat your claim?

Mr. Champion: No, sir, we say the court had no authority or jurisdiction to do that.

The Court: In other words, you say allowing your claim is valid but allowing their counterclaim is void.

Mr. Champion: As against the Government yes, sir.

The Court: And you now have a valid claim.

Mr. Champion: Yes, sir."

* * * * * * *

"I think the facts will simmer down to this, if the court holds that that judgment as entered is a valid judgment that is the end of the lawsuit, because they plead that judgment. The surety in this case and the intervener, which succeeded the Central Coal & Coke Company, plead that judgment as a bar to the right by us to recover in this action against the surety. If the court holds that judgment is valid that is the end of the lawsuit."

ITEM 2. The Regulation of the Secretary of the Interior, promulgated December 6, 1907:

"Each lessee shall produce coal equal to the aggregate of three thousand tons for each lease held by him, during the first year from date of approval thereof; four thousand tons during the second year; seven thousand tons during the third year; eight thousand tons during the fourth year, and fifteen thousand tons the fifth and each succeeding year during the term of such lease, or pay royalty as if such amounts had been produced; provided that any amount paid in excess of that required by actual production shall be held as a credit to be applied in payment of royalty on subsequent actual production, and a failure to meet this requirement will subject the lease or leases as to which default shall occur, to cancellation."

ITEM 3. The Regulation of the Secretary of the Interior, promulgated September 24, 1918:

"SECTION 12. Until full and final payment is made for any tract, leased or unleased, all mining operations thereon shall be conducted under the supervision of the representative of the United States Bureau of Mines at McAlester, Oklahoma, and the Mining Trustee of the Choctaw and Chickasaw Nations, or such other officer or officers as the Commissioner of Indian Affairs may designate, and in accordance with existing laws and Department rules and regulations governing the leasing of the segregated coal and asphalt in said Nations. The purchaser of any tract and the lessee thereof, their grantees, lessees, assigns, or successors shall be required to account under oath to said Mining Trustees or officer or officers designated by the Commissioner of Indian Affairs, the number of tons of coal and asphalt mined and removed from such tract, and such Mining Trustee or officer or officers shall have the right to examine all books and records of mining operations of such purchaser, lessee, grantees, assigns or successors.

"SECTION 13. Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in

payment of any installment when due. Any unused advance royalty to the credit of a lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the act of Congress approved February 8, 1918: Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Chactaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made."

ITEM 4. Section 4 of the Act of Congress of February 8, 1918, approved February 20, 1918, c. 12, 40 Stat. 433:

"SECTION 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any persons acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior

nd upon the terms as above provided, and shall also have the pref-rential right, except as herein otherwise provided, to purchase the oal deposits embraced in any lease held by such lessee by taking ame at the highest price offered by any responsible bidder at public uction at not less than appraised value, and if any lessee becomes he purchaser of any coal deposits on any undeveloped lease owned y him, then one-half of the advance royalties paid by any lessee n such lease shall be credited on the purchase price thereof, and ny residue of advance royalties heretofore paid by any lessee shall e credited to such lessee on account of any production of coal on ny other lease which he may own and operate: And, provided, That othing herein contained shall be construed as limiting or curtailing he rights of any lessee or owner of mineral deposits from acquiring dditional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and welve."

ITEM 5. Petition For Rehearing of the Petitioner of November 3, 1939, Filed in the United States Circuit Court of Appeals (supporting brief was to the same effect) we insert here because it is not a printed portion of the record at this time. Petitioner stated:

"But in concluding that the foregoing balance could not be re-xamined in a court possessing jurisdiction to render moneyed judg-nents against the Choctaw and Chickasaw Nations, this court in-dvertently failed to recognize the full import of certain prece-lents."

SUPREME COURT OF THE UNITED STATES.

No. 569.—October Term, 1939.

The United States of America, Petitioner, *vs.* United States Fidelity and Guaranty Company, J. M. Bernardin, Trustee, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 25, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

Certiorari was granted[1] because of probable conflict, on the first question, between the judgment below and *Adams* v. *United States*[2] and because of the importance of clarifying the meaning of the language in *United States* v. *Eckford*[3] relating to the judicial ascertainment of the indebtedness of the government on striking a balance against the United States where cross-claims are involved. A somewhat similar question arises in *United States* v. *Shaw*.[4] The

[1] January 8, 1940.
[2] 3 Ct. Cls. 312.
[3] 6 Wall. 484.
[4] No. 570, this term, decided today.

second question was taken because its solution is involved in certain phases of this litigation.

The United States, acting for the Choctaw and Chickasaw Nations, leased some coal lands to the Kansas and Texas Coal Company, with the respondent United States Fidelity and Guaranty Company acting as surety on a bond guaranteeing payment of the lease royalties. By various assignments the leases became the property of the Central Coal and Coke Company, as substituted lessee, the Guaranty Company remaining as surety. The Central Coal and Coke Company went into receivership in the Western District of Missouri, and the United States filed a claim for the Indian Nations for royalties due under the leases. Answering this claim, the Central Coal and Coke Company denied that any royalties were owing and claimed credits against the Nations for $11,060.90. By order of the court, reorganization of the Coal Company under Section 77B of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the Nations was allowed for $2,000, the debtor's cross-claim was allowed for $11,060.90, and the court on February 19, 1936, decreed a balance of $9,060.90 in favor of the debtor, to be "collected in the manner provided by law." No review of this judgment of the Missouri district court was ever sought.

On December 24, 1935, the United States, on its own behalf and on behalf of the Indian Nations, filed the present suit in the Eastern District of Oklahoma against the Guaranty Company, as surety on the royalty bond, for the same royalties involved in the Missouri proceedings. After the judgment of the Missouri district court, the Guaranty Company pleaded that judgment as a bar to recovery by the United States. The trustee of Central Coal and Coke Company, and the Central Coal and Coke Corporation, which had taken over certain interests in the assets of the Coal Company, alleged by a petition for leave to intervene, and, upon its allowance without objection, by an intervening petition, that they were necessary and proper parties because each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as determinative and pleaded the merits of the counterclaims by setting up the facts which supported the judgment; they asked for a decree that the Missouri judgment was valid, for a determination of accounts between themselves and the Indian Nations, and for all other proper

relief. Replying to the answer of the surety and the petition of the interveners, the United States pleaded that the Missouri judgment was void as to the interveners' cross-claims because the court was "without jurisdiction to render the judgment" against the United States and denied the cross-claims on the merits. The district court concluded that the Missouri judgment barred the claim against the surety and entitled the interveners to a judgment against the Indian Nations in the amount of the balance found by the Missouri court. This judgment the Circuit Court of Appeals affirmed.[5]

A.—By concession of the Government the validity of so much of the Missouri judgment as satisfies the Indian Nations' claim against the lessee is accepted. This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.[6]

B.—We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States* v. *Shaw*[7] we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.[8] No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States.[9] The public policy which exempted the dependent as well as the dominant sovereignties from suit without

[5] 106 F. (2d) 804.

[6] Bull v. United States, 295 U. S. 247, 261.

[7] No. 570, this term, decided today.

[8] Heckman v. United States, 224 U. S. 413, 442; Mullen v. United States, 224 U. S. 448, 451; United States v. Rickert, 188 U. S. 432. These cases discuss, also, the relationship between the United States and the Choctaw and Chickasaw Nations. See also United States v. Choctaw etc. Nations, 179 U. S. 494, 532; Choctaw Nation v. United States, 119 U. S. 1, 28.

Act of June 7, 1897, 30 Stat. 62, 83; Atoka Agreement, 30 Stat. 495, 505; Act of March 3, 1901, 31 Stat. 1447; Act of April 26, 1906, 34 Stat. 137, 144. Under § 28 of the Act of April 26, 1906, the tribal existence of the Chickasaw and Choctaw Nations is continued as modified by that and other acts.

[9] Cf. United States v. Algoma Lumber Co., 305 U. S. 415.

consent[10] continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.[11] It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants.[12] The provision, however, is applicable only to "any United States Court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding.[13] The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.

But, it is said, that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers. This is not permissible.[14]

The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral

[10] Cf. Cherokee Nation v. Georgia, 5 Pet. 1.

[11] Turner v. United States, 248 U. S. 354, 358; Adams v. Murphy, 165 Fed. 304, 308; Thebo v. Choctaw Tribe of Indians, 66 Fed. 372.

[12] Act of April 26, 1906, sec. 18, 34 Stat. 137, 148.

[13] Cf. Fidelity Ins., Trust and S. D. Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 303.

[14] Minnesota v. United States, 305 U. S. 382, 388 and cases cited: Munro v. United States, 303 U. S. 36, 41; Finn v. United States, 123 U. S. 227, 232.

attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.[15] *Chicot County Drainage District* v. *Baxter State Bank*[16] is inapplicable where the issue is the waiver of immunity.

In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy.[17] To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status,[18] extra-territorial action of courts,[19] or strictly jurisdictional and quasi-jurisdictional facts.[20] No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

C—The conclusion that the Missouri judgment is void determines this review. There is left in the case, however, an issue which requires brief reference to the second question upon which certiorari was granted. The intervening petition set up the facts supporting the claim of the interveners against the Indian Nations. An issue was made and the evidence of the Missouri controversy stipulated

[15] Kalb v. Feuerstein, No. 120, this term, decided January 2, 1940.

[16] No. 122, this term, decided January 2, 1940.

[17] See the last paragraph of the opening statement and the first paragraph of division *Second*.

[18] Andrews v. Andrews, 188 U. S. 14.

[19] Fall v. Eastin, 215 U. S. 1.

[20] Noble v. Union River Logging R. Co., 147 U. S. 165; cf. Johnson v. Zerbst, 304 U. S. 458.

for consideration in the present case. As the district court determined that the Missouri judgment was valid, no finding or conclusion appeared in the judgment of the district court upon the merits. Respondents made no objection to this omission but call attention to it in their brief. On a new trial this issue obviously will be important.

It is the contention of the Government that the cross-claim cannot be liquidated in this proceeding for the reason that by the statute under which this suit is brought, the right to set up a cross-claim is limited to "party defendants."[21] Respondents' reply that as they were admitted as interveners without objection, as they have an interest in cross-claims arising from the same transactions which form the basis of the principal suit, and as one of them is a principal liable for any judgment against the defendant surety, they are to all intents and purposes defendants under Section 18 of the Act of April 26, 1906.

As this judgment was entered before the effective date of the Civil Rules, procedure as to parties was governed by the Conformity Act.[22] Apparently under Oklahoma law the principal in the bond could not compel its admission as a party defendant.[23] As the Government did not object to the order filing the intervening petition we assume it properly filed and that the trustee for the Coal Company was actually a defendant. The name used is immaterial.

Whether the Coal Company was such a defendant as was meant by Section 18 raises other questions. Since they depend upon an interpretation of the federal statute they are to be determined by federal, not Oklahoma law.[24] As the extent and character of the

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[21] 34 Stat. 137, § 18:

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

[22] R. S. 914; Sawin v. Kenny, 93 U. S. 289; United Mine Workers v. Coronado Co., 259 U. S. 344, 382.

[23] Fidelity and Deposit Co. of Md. v. Sherman Machine and Iron Works, 67 Okla. 29.

[24] Board of County Comm'r v. United States, No. 14, this term, decided December 18, 1939, and Deitrick v. Greaney, No. 246, this term, decided February 12, 1940.

erest of the assignee Coal Corporation in the unliquidated claims f the Company do not appear from the record, we do not pass pon the question of whether the Company defendant has any cross- laim against the Indian Nations, after satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned ointly with the Corporation, it is a claim the Company may enforce s defendant under Section 18.

The cause is reversed and remanded to the district court for fur- ler proceedings in accordance with this opinion.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.